Supreme Court, U.S.
FILED

961647 APR 16 1997

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EDGAR ROMNEY, Manager-Secretary, Blouse, Skirt, Sportswear, Children's Wear & Allied Workers Union, Local 23-25, ILGWU,
Petitioner,

v.

ALAN LIN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act of 1974 ("ERISA") preempt an action to collect delinquent ERISA plan contributions brought under a New York statute declaring the ten largest shareholders of a closely-held corporation "personally liable for all debts, wages or salaries due and owing" to the corporation's employees?

2. Is such an action removable from state court to federal court?

PARTIES TO THE PROCEEDINGS

The names of all parties appear in the caption of the case. Petitioner has brought this action on behalf of an unincorporated association.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Edgar Romney, as Manager-Secretary of the Blouse, Skirt, Sportswear, Children's Wear & Allied Workers' Union, Local 23-25, Union of Needletrades, Industrial and Textile Employees (UNITE) (hereafter, "the Union"),[1] petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Second Circuit is reported at 94 F.3d 74, and is reprinted in the appendix to this petition at App. 1a-17a. The court of appeals' opinion denying Petitioner's petition for rehearing is reported at 105 F.3d 806, and is reprinted at App. 24a-39a. The opinion of the United States District Court for the Southern District of New York is reported at 894 F. Supp. 163, and is reprinted at App. 18a-23a.

JURISDICTION

The judgment of the Second Circuit was entered on August 27, 1996. The court of appeals denied a timely petition for rehearing on January 16, 1997. This petition is filed within ninety days of the denial of the petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant federal statutory provisions are §§ 502(a), 514(a) and 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended in 1980, 29 U.S.C. §§ 1132, 1144 and 1145.

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[1] While this action was pending before the District Court, the International Ladies' Garment Workers' Union, with which Local 23-25 was affiliated, merged with the Amalgamated Clothing and Textile Workers' Union to become UNITE.

Section 502, 29 U.S.C. § 1132(a), provides in pertinent part:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * *

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

> For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

Section 514(a), 29 U.S.C. § 1144(a), provides in pertinent part:

> § 1144. Other laws
>
> (a) Supersedure; effective date
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Section 515, 29 U.S.C. § 1145, provides:

> § 1145. Delinquent contributions
>
> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The relevant New York statutory provision is New York Business Corporation Law ("BCL") § 630, which provides in pertinent part:

> (a) The ten largest shareholders . . . of every corporation . . ., no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees. . . .
>
> * * * *

> An action to enforce such liability shall be commenced within 90 days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for such services.
>
> (b) For the purposes of this section, wages or salaries shall mean all compensation and benefits payable by an employer to or for the account of the employee for personal services rendered by such employee. These specifically shall include but not be limited to salaries, overtime, vacation, holiday and severance pay; employer contributions to or payments of insurance or welfare benefits; employer contributions to pension or annuity funds; and any other moneys properly due or payable for services rendered by such employee.

STATEMENT OF THE CASE

A collective bargaining agreement between Goodee Fashions, Inc. ("Goodee") and the Union obligated Goodee to contribute to various employee benefit funds. When Goodee did not make the contributions on time, the Union obtained a default arbitration award against Goodee. The Union then moved in the Supreme Court of the State of New York to enforce the arbitration award. On April 22, 1993, the state court issued a judgment against Goodee for $70,647.17. Execution against Goodee was returned unsatisfied. App. 2a-3a.

The Union thereupon commenced a state court action under BCL § 630 against Lin, Goodee's principal shareholder, to recover the delinquent contributions. App. 18a. BCL § 630 imposes personal liability upon certain corporate shareholders for employee compensation owed by the corporation when a judgment against the corporation is returned unsatisfied, providing in relevant part:

> (a) The ten largest shareholders . . . of every corporation . . . no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members

> of a national or affiliated national securities association, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants, or employees . . .
>
> * * * *
>
> An action to enforce such liability shall be commenced within 90 days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for such services.
> (b) For purposes of this section, wages or salaries shall mean all compensation and benefits payable by an employer to or for the account of the employee for personal services rendered by such employee. These specifically shall include but not be limited to salaries, overtime, vacation, holiday and severance pay; employer contributions to pension or annuity funds; and any other moneys properly due or payable for services rendered by such employee.

Lin removed the case to the district court on federal preemption grounds. The Union moved to remand, and Lin filed a motion to dismiss, claiming, *inter alia*, ERISA preemption. App. 19a. The district court denied the motion to remand and dismissed the action, holding that ERISA preempts BCL § 630 as applied to cases to collect on judgments for payment of benefit contributions. App. 18a-23a.

On appeal from the district court decision, the Union argued that there is no preemption under this Court's most recent ERISA preemption decisions and that, in any event, there is no removal jurisdiction because ERISA does not provide for any means of enforcing a judgment for delinquent contributions, whether against individual shareholders or otherwise.

Appearing as *amicus curiae*, the United States Secretary of Labor, the official with primary interpretation and enforcement authority for Title I of ERISA ("the Secretary") supported both of the Union's positions. The Secretary maintained, first, that *Peacock v. Thomas*, 116 S.Ct.

862 (1996), makes clear that there is no jurisdiction under ERISA over a cause of action " 'for imposing liability for an extant ERISA judgment against a third party' " (*id.*, at 866, *quoted* in Secretary of Labor's Brief as Amicus Curiae in Support of Plaintiff-Appellant Edgar Romney ("Sec'y Br."), at 7), and that removal was therefore improper. Second, the Secretary was of the view that "BCL 630 is not preempted by ERISA because Congress did not intend to preempt state law remedies for collecting ERISA judgments and because it does not "relate to" an employee benefit plan in the manner that phrase has been construed by the Supreme Court in its most recent decisions interpreting ERISA's preemption provisions." Sec'y Br. at 12-13.

By opinion dated August 27, 1996, the Second Circuit affirmed the district court's decision. The Second Circuit held that BCL § 630, although generally applicable to all forms of compensation, makes "explicit reference" to ERISA plans by defining "wages and salaries" to include contributions to benefit plans. App. 7a-9a. And, stated the Second Circuit, BCL § 630 meaningfully affects ERISA plans simply because, by providing collection mechanisms not provided in ERISA itself, "§ 630 would alter the incentives for employers to create and maintain ERISA plans, and thereby would affect plans in ways that Congress did not intend." App. 9a. Noting that New York's highest court had held BCL § 630 *not* preempted in *Sasso v. Vachris*, 66 N.Y.2d 28, 32-35 (1985), the court of appeals viewed *Sasso* as erroneous because based "principally [on the fact that] the New York statute did not purport to regulated the terms and conditions of employee benefit plans" and on legislative history indicating that in adding a collection provision to ERISA in 1980, "Congress intended . . . to supplement, rather than replace, state-law remedies." App. 13a-14a. Both lines of analysis, the Second Circuit thought, are inconsistent with *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

The Second Circuit therefore found the BCL § 630 action preempted by ERISA. And, because ERISA § 502(a) of ERISA, 29 U.S.C. § 1132(a), provides a cause of action against employers to collect employer contributions to ERISA plans, the court of appeals held that this case, although *not* one against an employer, was properly removed as completely preempted because it falls "within the scope of ERISA § 502(a)." App. 12a.

The Union petitioned for rehearing, and suggested a rehearing in banc, asserting that the Second Circuit's decision conflicts with *Peaccock v. Thomas,* 116 S.Ct. 862 (1996) and with *Greenblatt v. Delta Plumbing & Heating Corp.,* 68 F.3d 561 (2d Cir. 1995). Once again, the Secretary of Labor supported the Union's position as *amicus curiae.*

On January 16, 1997, the Second Circuit denied the Union's petition for rehearing, issuing a lengthy supplemental opinion "to address the important questions . . . raised by" the petition. App. 25a, 105 F.3d at 807. The supplemental opinion "acknowledge[d] that whether his [plaintiff's] suit is 'within the scope' of § 502(a) for purposes of complete preemption is a close question," (App. 37a), and that this "Court has had no occasion since that decision [*Metropolitan Life*] to elucidate" the meaning of "within the scope" of § 502(a). App. 38a. The court then interpreted "within the scope" of ERISA § 502(a) as encompassing all claims "of central concern to the federal statute," even if the suit "is directed against a defendant not liable under ERISA." 105 F.3d at 813, and on that basis affirmed its earlier conclusion that the removal was proper.

By order without opinion dated February 20, 1997, the Second Circuit denied the Union's petition for rehearing in banc.

REASONS FOR GRANTING THE WRIT

For well over a century, New York has protected workers by providing for the collection of unpaid employee compensation from shareholders of closely held corporations after the corporate employer becomes insolvent.[2] In 1985, the New York Court of Appeals found that ERISA did not preempt the use of BCL § 630, the most recent incarnation of the New York statute, to recover delinquent compensation in the form of contributions to ERISA funds, *Sasso v. Vachris*, 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985).

The Second Circuit nonetheless found this BCL § 630 action for delinquent contributions preempted by ERISA, and upheld the removal of the action from state court. By doing so, the court of appeals created a direct conflict as to the validity of a single statute between the highest court of the state and the federal appellate court with jurisdiction over that state. And, as a result of this decision, the intent of the New York legislature to insure that employees of closely-held corporations receive *all* the compensation to which they are entitled is being frustrated.

Further, the Second Circuit's decision is one of a large number of federal and state decisions addressing the generic question whether ERISA preempts state law actions to collect delinquent contributions from third parties, pursuant to state causes of action facilitating the collection of employee compensation. *See*, Table 1, pp. 22 *et seq.*, *infra*, summarizing the cases. The issue has recurred often because ERISA itself provides no method for assuring the payment of contributions through statutory liens, sureties, mandatory or voluntary performance bonds, or individual shareholder liability, leaving benefit plans with only traditional state law causes of action for collection from third parties where the employer become insolvent.

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[2] *Coffin v. Reynolds*, 37 N.Y. 640 (1868).

This Court, however, has not addressed the question whether ERISA precludes the use of generally applicable state causes of action for collecting past-due contributions to ERISA plans from third parties. And the lower court cases addressing the issue are all over the lot, reflecting in large degree confusion concerning this Court's ERISA preemption analysis as that analysis has evolved over time. Review by this Court would therefore settle an oft-occurring question of great importance as to which the lower court cases are in disarray.

Moreover, the Second Circuit's analysis of the preemption issue in this case is flatly inconsistent with this Court's most recent ERISA preemption case, *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 117 S.Ct. 832 (1997). The Second Circuit did not have the benefit of this Court's *Dillingham* decision, since the supplemental opinion in this case was issued a month before *Dillingham* was decided. An alternative to plenary review of this case, therefore, would be to grant certiorari and remand the case to the Second Circuit for consideration in light of *Dillingham*.[3]

Finally, even if the Second Circuit ERISA preemption decision in this case were correct on the merits, the question whether there is federal court jurisdiction over cases like this one is worthy of this Court's attention. As the court of appeals' supplemental opinion recognizes, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64, 66 (1987) held cases "within the scope" of ERISA § 502(a) completely preempted and therefore removable, but the Court has had no occasion in the ten years since *Taylor*

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[3] This Court has granted review and heard oral argument in two additional ERISA preemption cases, *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, No. 95-1594, and *Boggs v. Boggs*, No. 96-79, which may further elucidate this Court's revised approach to ERISA preemption. At the very least, the instant case should be held for *DeBuono* and *Boggs* and remanded in light of those cases if they prove pertinent.

to explain the "within the scope" standard. Although § 502(a) and § 515 of ERISA, read together, provide a cause of action for collection from an employer of unpaid benefit plan contributions, ERISA makes no provision for enforcement of a judgment against an employer, or for a third party to pay a judgment for payment of benefits. Whether a state cause of action covering a problem—enforcement of judgments—that § 502(a) of ERISA does not address, against a party who cannot be sued under § 502(a), is nonetheless "within the scope" of that section and therefore cognizable in federal court is a question of importance that needs this Court's clarification.[4]

I. THE SECOND CIRCUIT'S PREEMPTION HOLDING CONFLICTS WITH A DECISION OF THE NEW YORK COURT OF APPEALS, AND WITH THE DECISIONS OF OTHER COURTS.

To provide workers and their familites with reasonable benefits at reasonable costs to their employers, multiemployer benefit plans must have effective methods of collecting delinquent contributions. Historically, funds have relied upon both federal and state law collection mechanisms.[5]

As originally enacted, ERISA made no specific provision for collecting delinquent benefit plan contributions. In 1980, Congress enacted the Multiemployer Pension Plan Amendments Act, 94 Stat. 1208 (1980), including a provision, § 515, 29 U.S.C. § 1145, providing that employers are obligated to pay contributions to benefit plans. As a result of the enactment of § 515, § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B), providing for suits by plan fiduciaries to enforce any provision of Title I of ERISA,

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[4] As this case shows, the removal question can be determinative of the merits: The New York courts, under *Sasso*, would permit the BCL § 630 action to go forward while the federal courts under the Second Circuit's decision in this case would not.

[5] *Sasso*, 66 N.Y.2d at 34-35.

became available as a means of enforcing against employers themselves their obligation to make contributions. Nothing in § 515, 502(a), or any other provision or ERISA, however, provides for the enforcement of any judgment for delinquent contributions, or for any means of assuring the payment of such contributions by placing a payment obligation on third parties.

After 1980, the question arose in a myriad of cases whether various state law mechanisms available to assure the payment of delinquent compensation, including delinquent benefit plan contributions, remained viable as applied to compensation in the form of ERISA contributions, or whether instead Congress, by providing under ERISA itself for direct lawsuits against delinquent employers, had eliminated longstanding state law methods for collecting from third parties on obligations owed to employees as creditors.

1. In *Sasso v. Vachris,* 66 N.Y.2d 28 (1985), the New York Court of Appeals held that ERISA does not preempt a venerable New York collection mechanism, BCL § 630, providing an action against shareholders for a corporate employer's failure to pay compensation, including delinquent contributions to ERISA funds. *Sasso* directly conflicts with the instant case. And, as long as there is a conflict between decisions of the authoritative state and federal courts concerning whether shareholders in New York are responsible to pay delinquent contributions, principals of employers who decide whether or not to provide benefits, and ERISA plans which provide benefits, will be unsure of their rights and/or obligations with regard to delinquent contributions.

Moreover, the disagreement between the New York Court of Appeals in *Sasso* and the Second Circuit in this case is one not only of result but of analysis, and reflects a basic, continuing conflict in the case law concerning the role of § 515 of ERISA in preempting state law remedies

for collecting delinquent benefit plan contributions. *Sasso* based its nonpreemption conclusion largely on the legislative history of ERISA § 515: In enacting § 515, Congress expressed its intent that ERISA § 515 "does not change any other type of remedy permitted under State or Federal law with respect to delinquent multiemployer plan contributions." [6] The New York Court of Appeals in *Sasso* viewed that statement as indicating a specific intent that alternative state law mechanisms for the collection of delinquent contributions remain in place. *Id.* at 35-36. The Second Circuit, in contrast, ignored that history, maintaining that under *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), decided after *Sasso*, ERISA displaces state causes of action that supplement ERISA remedies, Congress' specific intent to the contrary notwithstanding.

2. Since *Sasso*, other lower courts have considered the preemption of a broad range of state law actions for delinquent contributions against third parties. Some statutes make shareholders or officers liable for compensation owed to employees of their defunct corporations. Other statutes specifically regulate the construction industry, requiring property owners to guarantee compensation to the contractors' employees who build on their property, through mechanics liens or otherwise; mandating that general contractors guarantee the compensation of their subcontractors' employees; obligating contractors to purchase bonds guaranteeing their payments of employee compensation; or requiring property owners to withhold funds from contractors upon notice of nonpayment of the contractors' employees. Some of these actions are based on general surety law and seek to recover delinquent con-

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[6] Senate Labor and Finance Committees' Joint Explanation of S 1076, 126 Cong. Rec. 20202 (1980). *See also*, House of Representatives Committee on Ways and Means, Report to Accompany HR 3904, H.R. Rep. No. 869(II), 96th Cong., 2d Sess. 51 (1980), containing almost identical language.

tributions from the issuers of bonds guaranteeing an employer's performance of a labor contract, where the employer was obligated by the labor contract to purchase the bond.

Most of the lower court cases addressing the impact of ERISA § 515 on various state-law means of assuring that employees are paid all the compensation due them, including benefit contributions on their behalf, are listed in Table 1, p. 22, *infra*. As that Table indicates, until 1995, the cases fairly consistently found preemption.[7] The lower courts, relying on this Court's teachings in cases decided before *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995) ("*Travelers*"), found that "relates to," when given a "broad common-sense meaning," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987), preempts these state laws because they more than tangentially affect ERISA plans. *E.g. Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548, 553 (5th Cir.), *cert. denied*, 497 U.S. 1024 (1990); *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 16-18 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992).

According to the pre-*Travelers* decisions, state statutes can fatally reference ERISA plans or specifically regulate ERISA plans, although they merely contain language clarifying that ERISA benefits are encompassed within the general category of employee compensation governed by the statutes, or assuring that ERISA plans be treated as other creditors, i.e. employees, owed monies for employee compensation. *E.g. McCoy*, 950 F.2d at 18-20; *Iron Workers Mid-South Pension Fund*, 891 F.2d at 553 and 555-556, n.7. The cases also held the state laws preempted because they provide alternate mechanisms to those provided by

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[7] Before 1995, *Sasso*, along with *Plumbers Local 458 Holiday Vacation Fund v. Howard Immel, Inc.*, 151 Wis.2d 233, 445 N.W.2d 43 (App. 1989), were aberrations, cited with disapproval, e.g. *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 20, n.3 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992).

ERISA §§ 502(a) and § 515 to collect delinquent contributions. *E.g. Iron Workers Mid-South Pension Fund*, 891 F.2d at 554-555.

In 1995, this Court in *Travelers* recognized that "our prior attempts to construe the phrase "relate to" [in § 514(a) of ERISA] do not give us much help" (115 S. Ct. at 1677), and directed that in determining questions of ERISA preemption, courts must "go beyond the unhelpful text and the frustrating difficulty of defining ["relates to"] . . . and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.*

Following this admonition, "the recent cases [concerning state law causes of action providing for collection of delinquent contributions against non-employers] . . . demonstrate a clear change in emphasis." *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities v. First Indemnity of America Insurance Company*, 287 N.J. Super. 498, 508, 671 A.2d 596, 600 (App. Div. 1996), *cert. granted*, 679 A.2d 654 (N.J. 1996). Consistent with *Travelers*, several courts addressing state law third-party collection cases recently have rejected an all encompassing interpretation of "relate to," *Board of Operating Engineers Local 825 Fund Service Facilities*, 671 A.2d at 601, and held that such actions do not "relate to" ERISA plans where their only effect is to "increase the money available for payment of benefits," an effect too incidental to warrant preemption. *Seaboard Surety Company v. Indiana State District Council of Laborers and Hod Carriers Health and Welfare Fund*, 645 N.E.2d 1121, 1127 (Ind. App. 1995); see also, *Ragan v. Tri-County Excavating, Inc.*, 62 F.3d 501, 512 (3d Cir. 1995). These recent decisions recognize as well that state laws governing employee compensation are laws within the traditional exercise of state authority and/or laws of general applicability which do not single out ERISA plans for special treatment (*e.g. Hawaii Laborers Trust Fund v. Maui Prince Hotel*, 81 Haw. 487, 918 P.2d 1143, 1154

(1996); *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities*, 671 A.2d at 601; *Seaboard Surety Company*, 645 N.E.2d at 1127-1129, and that state law third party collection actions are not alternate enforcement mechanisms to the ERISA § 502(a)—§ 515 action because the ERISA sections provide for an action against "employers," and the state law actions are against other parties. *Ragan*, 62 F.3d at 512. And these cases give effect to the legislative history specifically indicating that Congress did not intend that ERISA § 515 provide an exclusive remedy for collecting delinquent contributions, *Hawaii Laborers' Trust Funds*, 918 P.2d at 1155; *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities*, 671 A.2d at 600; *Seaboard Surety Company*, 645 N.E.2d at 1124.

Of particular importance for purposes of this petition, among the very recent cases inconsistent in principle with the Second Circuit decision in this case is one from a state high court, the Hawaii Supreme Court's *Hawaii Laborers Trust Fund*.[8] *Hawaii Laborers Trust Fund*, stressed in particular the § 515 legislative history the Second Circuit in this case deemed irrelevant, upheld as consistent with ERISA a state mechanics lien statute identical for all relevant purposes to the statutes held preempted in *Iron Workers*, *McCoy*, and other earlier cases.

Because of the recent "clear shift in emphasis," the law concerning the viability of state law third-party action as a means of collecting ERISA plan contributions is currently in a state of confusion, with even single courts issuing conflicting decisions.[9] And despite the prolifera-

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[8] *Hawaii Laborers Trust Fund* relied heavily on a well-reasoned 1989 Wisconsin Court of Appeals case, *Plumber's Local 458 Holiday Vacation Fund v. Howard Immel, Inc.*, 151 Wis.2d 233 (Wis. App. 1989).

[9] Compare the instant case with *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561 (2d Cir. 1995), and *Seaboard Surety*

tion of cases since 1980, this Court has never considered whether ERISA preempts state law actions to collect delinquent contributions from third parties. The time has come for it to do so.

II. THE SECOND CIRCUIT'S PREEMPTION ANALYSIS DIRECTLY CONFLICTS WITH THE ERISA PREEMPTION DECISIONS OF THIS COURT.

In reaching its conclusion that BCL § 630 is preempted, the Second Circuit ran afoul of this Court's latest ERISA preemption decisions in three different ways:

First, central to the Second Circuit's decision was its conclusion that BCL § 630 meaningfully references ERISA plans and is therefore preempted by ERISA. App. 7a-9a. But BCL § 630 applies to *all* forms of employee compensation, mentioning benefit plan contributions particularly only to make clear that they are among the forms of compensation covered. And *Dillingham* emphasizes that " 'reference' will result in preemption" only "[w]here a State's law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation. . . . "117 S. Ct. at 838.

In *Dillingham* itself, for example, the Court held that there was no explicit "reference to" any ERISA plan, because, although most apprenticeship plans are ERISA-covered, both ERISA-covered and non-ERISA-covered apprenticeship programs come within the state law there in question. 117 S. Ct. at 838-39. Here, since BCL § 630 applies to all employee compensation and ERISA contributions comprise only thirty percent of such compensa-

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Company v. Indiana State District Council of Laborers and Hod Carriers Health and Welfare Fund, 645 N.E.2d 1121 (Ind. App. 1995) with *Edwards v. Bethlehem Steel Corp.*, 554 N.E.2d 833 (Ind. App. 1990).

tion,[10] the Second Circuit's conclusion that BCL § 630 impermissibly references ERISA plans cannot be squared with *Dillingham*.[11]

Second, *Travelers* and *Dillingham* clarify that state laws do not run afoul of ERISA preemption simply by affecting the plan's economic viability or creating incentives for employers and plan administrators to structure employee compensation in one way rather than another. Relying on *Travelers*, for example, *Dillingham* held that the California prevailing wage statute was not preempted because, although that statute "alters the incentives," it "does not dictate the choices, facing ERISA plans." 117 S. Ct. at 842. The Second Circuit in this case, in stark contrast, held that BCL § 630 *is* preempted because it "would alter the incentives for employers to create and maintain ERISA plans, and thereby would affect ERISA plans in ways that Congress did not intend." App. 9a. Similarly, while the Second Circuit in its preemption analysis relied upon the fact that the New York statute "assist[s] the collection of funds available for plan purposes," App. 8a, the surcharges held non-preempted in *Travelers* also affected the quantity "of funds available for plan purposes."

Third, *Travelers* and *Dillingham* stress that state law governing areas of traditional state regulation are presumptively not subject to federal preemption. The Second Circuit applied no such presumption against preemption, ignoring entirely the fact that statutes imposing liability on shareholders for employee compensation owed by their

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[10] Ginsbach, "Compensation Costs: Downward Trend in Benefit Costs Evident in Annual Pay Estimates," 1995 BNA Daily Labor Reports 121 d23 (June 23, 1995).

[11] *See also, United Wire, Metal & Machine Health & Welfare Fund v. Morristown Memorial Hospital*, 995 F.2d 1179, 1192, n.6 (3rd Cir. 1993), *cert. denied*, 114 S. Ct. 382 (1993) (no meaningful reference to ERISA plans where statute references ERISA plans only as examples in a broader category to which the statute generally applies).

corporations most directly regulate the corporate form, decidedly an area of traditional state regulation. *Burks v. Lasker*, 441 U.S. 471, 478 (1979).

Because the Second Circuit's preemption analysis in this case flies in the face of this Court's cases, a grant of certiorari is appropriate.

We recognize that the court of appeals completed its consideration of this case before this Court decided *Dillingham*, and that it may not have been clear under *Travelers*, standing alone, that a statute such as this one, applying to all forms of compensation and creating only economic incentives but no mandatory administrative rules, is not preempted under ERISA. One possible disposition of this petition, consequently, would be to grant the petition, vacate the decision below, and remand for consideration in light of *Dillingham*. In light, however, of the independent importance of the question whether ERISA permits use of state law collection mechanisms imposing third-party liability and the confusion over a long period of time in the lower courts concerning that question, the better course would be for this Court to settle the issue once and for all by granting plenary review.

III. THE SECOND CIRCUIT'S HOLDING THAT THIS CASE WAS PROPERLY REMOVED IS CONTRARY TO THIS COURT'S PRECEDENTS.

A state law action is completely preempted by ERISA, and therefore removable, if it is both preempted by ERISA *and* falls "within the scope" of ERISA § 502(a). *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). This BCL § 630 action, and other state law actions to collect delinquent contributions from third parties, even if substantively preempted, are not "within the scope" of ERISA § 502(a) under this Court's cases.

As *Metropolitan Life* indicates, removal jurisdiction lies only over claims which, if "well pled," would be within

the original jurisdiction of federal courts under ERISA. ERISA § 502(f) provides for original jurisdiction only over those claims seeking "the relief provided for in" ERISA § 502(a).[12] 481 U.S. at 63-67. Therefore, only such claims are "within the scope" of ERISA § 502(a).

This Court made quite clear just last year that ERISA § 502(a) does not permit an action against a corporate shareholder, where the corporation violated ERISA but the shareholder violated neither an ERISA provision nor the terms of an ERISA plan, and that there is therefore no jurisdiction in federal court over such an action. *Peacock v. Thomas*, 116 S.Ct. 862, 866-867 (1996) (no "provision of ERISA . . . provides for imposing liability for an extant ERISA judgment against a third party."). And ERISA § 515 does not cover claims against, and therefore § 502(a) provides no remedy against, a defendant obligated by a statute, rather than by a labor contract, to contribute to ERISA funds. *Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988).

Since an action under BCL § 630 is one seeking to impose liability for an ERISA judgment on a third party and is based on a statutory rather than contractual obligation, there is no federal court ERISA jurisdiction over such an action. The Second Circuit, acknowledging that the question is "close" (105 F.3d at 812), nonetheless held that a BCL § 630 action is "within the scope" of ERISA § 502(a), on the ground that *any* "suit to collect ERISA contributions is very much of central concern to the federal statute." App. 38a.

No general principle basing complete preemption on ERISA's "central concerns" is mentioned in *Taylor*. Rather, *Taylor* started from quite the contrary rule—that:

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[12] ERISA 502(f), 29 U.S.C. 1132(f), reads: "The district courts of the United States shall have jurisdiction . . . to grant the relief provided for in subsection (a) of this section in any action."

> "[e]*ven with a provision . . . that lies at the heart of a statute with the unique pre-emptive force of ERISA* . . . we would be reluctant to find that extraordinary preemptive power . . . that converts an ordinary state . . . complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." [*Id.*, emphasis supplied]

The complete preemption result in *Taylor* was based not on any general "central concerns" principle but primarily upon legislative history concerning Congress' *particular* intent with regard to suits for payment of benefits. 481 U.S. at 65. This case, however, is one for collection of contributions, not payment of benefits. As shown above (at p. 12, *supra*), the pertinent legislative history of the ERISA *collection* provisions concerns the 1980 amendments, not the original 1974 statute at issue in *Taylor*. That history is quite different in substance from that concerning suits for benefits relied upon in *Taylor*, for it evidences a specific intention *not* to create an area of exclusive federal concern. *Id.*

The complete preemption aspect of the Second Circuit's decision in this case is, consequently, as squarely contrary to this Court's precedents as the substantive preemption ruling, and merits this Court's attention on plenary review.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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TABLE I

Statutes imposing liability on shareholders and/or officers for employee compensation

Action not preempted:

Sasso v. Vachris, 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985)

Action preempted:

Baker v. Caravan Moving Corp., 561 F.Supp. 337 (N.D. Ill. 1983)

Blackburn v. Iversen, 925 F.Supp. 118 (D. Conn. 1996)

Calhoon v. Bonnabel, 560 F.Supp. 101 (S.D. N.Y. 1982)

McMahon v. McDowell, 794 F.2d 100 (3d Cir. 1986), *cert. denied*, 479 U.S. 971 (1986)

Trustees of Sheet Metal Workers' International Association Production Workers' Welfare Fund (New York) v. Aberdeen Blower and Sheet Metal Workers, 559 F.Supp. 561 (E.D. N.Y. 1983)

Statutorily required construction bonds

Action not preempted:

Alibrandi Building Systems, Inc. v. Wm. C. Pahl Construction Co., 187 A.D.2d 957, 590 N.Y.S.2d 370 (1992)

Bleiler v. Cristwood Construction, Inc., 72 F.3d 13 (2d Cir. 1995)

Board of Trustees of Operating Engineers Local 825 Fund Service Facilities v. First Indemnity of America Insurance Company, 287 N.J. Super. 498, 671 A.2d 596 (App. Div. 1996), *cert. granted*, 679 A.2d 654 (N.J. 1996)

Eacott v. Insurance Company of North America, 40 Conn.App. 777, 673 A.2d 587 (1996)

Local Union No. 46 Metallic Lathers Union and Reinforcing Iron Workers of New York City and Vicinity v. Trataros Construction, Inc., 920 F.Supp. 55 (S.D. N.Y. 1996)

Seaboard Surety Company v. Indiana State District Council of Laborers and Hod Carriers Health and Welfare Fund, 645 N.E.2d 1121 (Ind. App. 1995)

Action preempted:

Carpenters Health & Welfare Trust Fund v. Surety Co. of the Pacific, 13 Cal.App.4th 1406, 18 Cal. Rptr.2d 661 (1993)

Puget Sound Electrical Workers Health & Welfare Trust Fund v. Merit Co., 123 Wash.2d 565, 870 P.2d 960 (1994) *

Williams v. Ashland Engineering Co., 45 F.3d 588 (1st Cir. 1995), *cert. denied*, 116 S.Ct. 51 (1995)

Stop notice:

Action preempted:

Bricklayers & Allied Craftsmen Int'l Union Local 33 Benefit Funds v. America's Marble Source Inc., 950 F.2d 114 (3d Cir. 1991)

Carpenters Health & Welfare Trust Fund for Cal. v. TRI Capital Corp., 25 F.3d 849 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 580 (1994)

Carpenters Health & Welfare Trust Fund v. Developers Ins. Co., 11 Cal. App. 4th 1539, 15 Cal. Rptr.

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* *Puget Sound* also found preempted an action under a state statute requiring "a public agency to retain a sum from the moneys earned by the general contractor as a trust fund for the protection and payment of all persons who furnish labor, materials, or supplies on the furtherance of the public work." 870 P.2d at 961.

2d 85 (1992), *review denied* (Mar. 25, 1993), *cert. denied*, 114 S.Ct. 91 (1993)

Private agreement bonds:

Action not preempted:

Greenblatt v. Delta Plumbing & Heating Corp., 68 F.3d 561 (2d Cir. 1995)

Ragan v. Tri-County Excavating, Inc., 62 F.3d 501 (3d Cir. 1995)

Action preempted:

Operating Engineers Pension Trust v. Insurance Co. Of the West, 35 Cal.App.4th 59, 42 Cal.Rptr.2d 1 (1995)

Construction liens:

Action not preempted:

Alibrandi Building Systems, Inc. v. Wm. C. Pahl Construction Co., 187 A.D.2d 957, 590 N.Y.S.2d 370 (1992)

Hawaii Laborers' Trust Funds v. Maui Prince Hotel, 81 Haw. 487, 918 P.2d 1143 (1996)

Plumbers local 458 Holiday Vacation Fund v. Howard Immel, Inc., 151 Wis.2d 233, 445 N.W.2d 43 (App. 1989)

Action preempted:

Carpenters Southern Cal. Admin. Corp. v. El Capitan Dev. Co., 53 Cal.3d 1041, 282 Cal. Rptr. 277, 811 P.2d 296, *cert. denied*, 502 U.S. 963 (1991)

Chestnut-Adams Limited Partnership v. Bricklayers & Masons Trust Funds of Boston, 415 Mass. 87, 612 N.E.2d 236 (1993)

Edwards v. Bethlehem Steel Corp., 554 N.E.2d 833 (Ind. App. 1990)

Iron Workers Mid-South Pension Fund v. Terotechnology Corp., 891 F.2d 548 (5th Cir.), *cert. denied*, 497 U.S. 1024 (1990)

McCoy v. Massachusetts Institute of Technology, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992)

Plumbing Industry Board, Plumbing Local Union No. 1 v. L&L Masons, Inc., 927 F.Supp. 645 (S.D. N.Y. 1996)

Prestridge v Shinault, 552 So.2d 643 (La. Court of Appeal 1989), *writ denied*, 559 So.2d 131 (La. 1990)

Sturgis v. Herman Miller, Inc., 943 F.2d 1127 (9th Cir. 1991)

Statutory liability of general contractor for subcontractor's employees' compensation

Action preempted:

Trustees of Electrical Workers Health & Welfare Trust v. Marjo. Corp., 988 F.2d 865 (9th Cir. 1992)

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1602, Docket 95-9275

EDGAR ROMNEY, Manager-Secretary, BLOUSE, SKIRT, SPORTSWEAR, CHILDREN'S WEAR & ALLIED WORKERS UNION, LOCAL 23-25, ILGWU,

Plaintiff-Appellant,

v.

ALAN LIN,

Defendant-Appellee.

Argued June 7, 1996

Decided Aug. 27, 1996

Before: NEWMAN, Chief Judge, JACOBS, Circuit Judge, and CHATIGNY, District Judge.[1]

JACOBS, Circuit Judge:

Plaintiff Edgar Romney is a union official who holds an uncollected state court judgment against an employer that failed to make contributions to employee benefit funds. Romney brought a collection suit in state court under a state law. N.Y.Bus.Corp.Law § 630 (McKinney 1986) ("§ 630"), which provides that, for certain corporations, such obligations may be enforced against the

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[1] The Honorable Robert N. Chatigny, of the United States District Court for the District of Connecticut, sitting by designation.

company's ten largest shareholders. The shareholder defendant, Alan Lin, removed the collection action to the United States District Court for the Southern District of New York, pleading federal question jurisdiction on the ground that the state-law cause of action is preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. Chief Judges Griesa dismissed the complaint. On appeal, Romney claims that the district court lacked subject matter jurisdiction.

For the reasons set forth below, we affirm the judgment of the district court.

BACKGROUND

When we review a district court's dismissal of a complaint pursuant to Fed.R.Civ.P. 12(b)(6), we take as true the facts that are alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 20 (2d Cir. 1996). The allegations of the complaint are as follows.

On July 1, 1990, Goodee Fashions (a New York corporation) entered into a collective bargaining agreement with the Blouse, Skirt, Sportswear, Children's Wear & Aliled Workers Union, Local 23-25, ILGWU (the "Union"). Among other undertakings, Goodee Fashions was required to make contributions to four employee benefit funds. Three of these multi-employer funds are ERISA funds; the fourth was the subject of a settlement and is not at issue in this appeal.[2] Goodee Fashions failed to make contributions to the ERISA funds during the first half of 1992. Pursuant to the collective bargaining agreement, the Union sought arbitration of the contributions dispute. On October 9, 1992, the Union won a default

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[2] The three ERISA funds are the ILGWU National Retirement Fund, the ILGWU Health Services Plan, and the ILGWU Health & Welfare Fund.

arbitration award. On April 22, 1993, the award was confirmed by the New York State Supreme Court, New York County, and a judgment was entered in the amount of $70,647.17. Execution against Goodee Fashions was returned unsatisfied.

Romney, the Union's Manager-Secretary, commenced this action in New York State Supreme Court, New York County, on March 3, 1994. Romney claimed that defendant Lin, as one of the ten largest shareholders of Goodee Fashions, was liable under New York law for the company's unpaid contributions to the ERISA funds. *See* N.Y.Bus.Corp.Law § 630. Lin removed the action to federal district court on April 18, 1944, alleging jurisdiction on three independent grounds: (1) diversity of citizenship, (2) preemption under the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-197, and (3) preemption under ERISA.[3] On June 13, 1994, Lin moved for dismissal of the complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Romney cross-moved for an order remanding his case to state court.

In an opinion dated August 23, 1995, the district court denied Romney's cross-motion for remand, and granted Lin's motion to dismiss the complaint, on the ground that Romney's claim was preempted by ERISA. *Romney v. Lin*, 984 F.Supp. 163, 165-66 (S.D.N.Y.1995). Specifi-

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[3] Since we conclude that ERISA preemption confers subject matter jurisdiction, we do not address the other possible bases of jurisdiction raised in Lin's petition for removal.

The petition asserts that there may be diversity jurisdiction, but the district court dismissed the complaint before any answer was filed, and it is unclear on this record whether that jurisdictional basis is viable.

Lin also argued in his petition that LMRA § 301, 29 U.S.C. § 185(a), preempted Romney's claim. The district court correctly ruled that § 630 is not preempted by LMRA § 301. *See Albradco, Inc. v. Bevona*, 952 F.2d 82, 87 (2d Cir.1992).

cally, the district court reasoned that "ERISA contains a detailed provision regarding civil enforcement," and that the ERISA enforcement scheme "does not authorize any type of action against officers and stockholders of a corporate employer to recover contributions owed to an ERISA fund." *Id.* at 166. In so deciding, the district court acknowledged that its disposition conflicted with a ruling by the Court of Appeals of New York that § 630 is not preempted by ERISA, *Sasso v. Vachris,* 66 N.Y.2d 28, 34, 494 N.Y.S.2d 856, 860, 484 N.E.2d 1359, 1363 (1985). *Lin,* 894 F.Supp. at 165-66; *accord Romney v. Cai,* Nos. 94 CV 2546, 2547, 2548, 1996 (WL 331184, at *2-*3 (E.D.N.Y. June 4, 1996).

We affirm on the ground adopted by the district court.

DISCUSSION

On appeal, Romney argues that the district court erroneously assumed that it had removal jurisdiction based on ERISA preemption. We review de novo whether the district court had subject matter jurisdiction. *Scelsa v. City Univ.,* 76 F.3d 37, 40 (2d Cir.1996).

A defendant in a state court civil action may remove a case over which the district court has original jurisdiction, 28 U.S.C. § 1441(a), including of course a civil action that "aris[es] under the . . . laws . . . of the United States." 28 U.S.C. §§ 1331, 1441(b). Although "[i]t is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law," *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 63, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987), a state-law cause of action arises under federal law within the meaning of 28 U.S.C. § 1331, and is removable under 28 U.S.C. § 1441, if (1) the cause of action is based on a state law that is preempted by ERISA, and (2) the cause of action is "within the scope of the civil enforcement provisions" of ERISA § 502(a), 29 U.S.C. § 1132(a). *Id.* at 64-66, 107 S.Ct. at 1546-48;

see also Greenblatt v. Delta Plumbing & Heating Corp., 68 F.3d 561, 573 (2d Cir.1995); *Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144, 149 (2d Cir.1995). That is because Congress specifically intended to exert "extraordinary preemptive power" when it adopted the detailed provisions of ERISA § 502(a). *Metropolitan Life Ins.*, 481 U.S. at 64, 107 S.Ct. at 1546-47.

In this case, preemption is therefore one requisite of removal jurisdiction, as well as the key to the merits. We address preemption first. Then, because preemption alone is insufficient to support removal jurisdiction, we address the other requisite: whether Romney's suit under § 630 is "within the scope of the civil enforcement provisions" of ERISA § 502(a). Third, we consider the contrary decision in *Sasso v. Vachris*. Finally, we turn to two other arguments advanced by Romney on this appeal.

A. *Preemption.*

The preemption language of ERISA, contained in § 514(a), is purposefully sweeping:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter II of this chapter shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a) (emphasis added); *see New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, —— U.S. ——, ——, 115 S.Ct. 1671, 1677, 131 L.Ed.2d 695 (1995) (hereinafter. "*Blue Cross*") (ERISA § 514(a) "is clearly expansive"). The exemptions spelled out in subsection (b)—such as state laws that regulate insurance, banking, or securities, and state criminal statutes—are inapplicable, as the parties agree. The question is therefore whether § 630 "relates to" ERISA plans. *See Shaw v. Delta Air Lines, Inc.*, 463

U.S. 85, 98, 103 S.Ct. 2890, 2900-01, 77 L.Ed.2d 490 (1983). "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has *a connection with* or *reference to* such a plan." *Id.* at 96-97, 103 S.Ct. at 2900 (emphasis added). We have said that a state law "relates to" ERISA plans if it either (1) "makes explicit reference to ERISA plans," or (2) would disserve the basic purpose of preemption in ERISA § 514, "namely 'to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.' " *Greenblatt*, 68 F.3d at 574 (citation omitted). We conclude that § 630 is preempted on either ground.

1. Explicit Reference

A reference to ERISA plans may be explicit without actually using the term "ERISA plans." *Travelers Ins. Co. v. Pataki*, 63 F.3d 89, 94 (2d Cir.1995); *see, e.g., District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130, 113 S.Ct. 580, 583-84, 121 L.Ed.2d 513 (1992) (statute that specified "the existing health coverage of the employee" referred to ERISA plans and was preempted); *FMC Corp. v. Holliday*, 498 U.S. 52, 59, 111 S.Ct. 403, 408, 112 L.Ed.2d 356 (1990) (same where statute specified "[a]ny program, group contract or other arrangement for payment of benefits"); *cf. Ingersoll-Rand v. McClendon*, 498 U.S. 133, 140, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990) (state common-law cause of action was preempted where plaintiff must plead "employer's desire to avoid contributing to, or paying benefits under, the employee's pension fund").

Even so, a state statute is not preempted by ERISA if it "affect[s] employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' a plan." *Shaw*, 463 U.S. at 100 n. 21, 103 S.Ct. at 2901 n. 21; *see also Greater Wash. Bd. of Trade*, 506 U.S. at 130 n. 1, 113 S.Ct. at 583 n.1 (quoting

Shaw). "[T]he Supreme Court has never found a statute to be preempted simply because the word ERISA (or its equivalent) appears in the text." *NYS Health Maintenance Org. Conference v. Curiale*, 64 F.3d 794, 800 (2d Cir.1995) (discussing *Greater Wash. Bd. of Trade*); *see Thiokol Corp. v. Roberts*, 76 F.3d 751, 758 (6th Cir. 1996) ("When the Court strikes down a statute that 'refers to' ERISA or a covered plan, it does so not because of the reference per se . . . [but] because that reference has a legal effect."), *petition for cert. filed*, 64 U.S.L.W. 3808 (U.S. May 23, 1996) (No. 95-1913). In order to trigger ERISA preemption, a statute must not merely mention or allude to an ERISA plan, but must also have some "relationship" to ERISA plans or "affect[] ERISA plans in some manner." *Curiale*, 64 F.3d at 799-800 & n. 15; *accord Thiokol*, 76 F.3d at 756-61 ("[S]tatutes that refer to ERISA, but have no effect on a covered plan, are not within the scope of the definition of relates to and, as such, are not pre-empted."); *United Wire, Metal and Machine Health & Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179, 1192 n. 6 (3d Cir.) ("[F]or example, a state statute providing that 'no employer, including an ERISA plan, shall discriminate on grounds of race or gender' would not be preempted despite its reference to an ERISA plan."), *cert. denied*, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 832 (1993).

Does § 630 make "explicit reference" to ERISA plans? The relevant text of that statute provides:

> *The ten largest shareholders* . . . of every corporation . . . no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, *shall jointly and severally be personally liable for* all debts, *wages or salaries due and owing* to any of its laborers, servants or employees. . . .

N.Y.Bus.Corp.Law § 630(a) (emphasis added).[4] The statute defines "wages or salaries" as "all compensation and benefits payable by an employer to or for the account of the employee for personal services rendered by such employee. These shall specifically include . . . employer contributions to or payments of insurance or welfare benefits [and] employer contributions to pension or annuity funds. . . ." *Id.* § 630(b). Although this state statute does not say "ERISA plans" in so many words, the references to "insurance or welfare benefits" and "pension or annuity funds" that are supported by "employer contributions" describe (or include) with sufficient specificity welfare benefit plans that are regulated under ERISA, and therefore "make[] explicit reference to ERISA plans." *Greenblatt*, 68 F.3d at 574.

Moreover, § 630's reference to ERISA plans is no passing mention or allusion. *See Curiale*, 64 F.3d at 799-800 & n. 15. It is evident that the expanded remedy afforded by § 630 would "affect[] ERISA plans," *id.* at 800, by assisting the collection of funds available for plan purposes; indeed, one element of Romney's cause of action here is the existence of the three ERISA plans that have suffered from Goodee Fashions' delinquencies. It makes no difference that § 630 assists rather than burdens ERISA plans. Congress' purpose in providing for preemption in ERISA § 514(a), 29 U.S.C. § 1144(a), was to relieve employers from having to comply with "differing regulatory requirements in differing States," *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9, 107 S.Ct. 2211, 2216, 96 L.Ed.2d 1 (1987), lest the burdens of such compliance "introduce considerable inefficiencies . . . , which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain

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[4] In his complaint, Romney specifically alleged that Goodee Fashions had no shares that are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association.

from adopting them," *id.* at 11, 107 S.Ct. at 2217. Thus, while § 630 would be salutary for plans that suffer a loss by reason of an employer's failure to contribute, this benefit would be achieved at a cost because, for stockholders of companies subject to § 630, personal liability may be a factor that militates against creating ERISA plans in the first place.

As the district court emphasized, Congress provided for a comprehensive set of remedies in ERISA § 502(a), 29 U.S.C. § 1132(a). *Ingersoll-Rand*, 498 U.S. at 144, 111 S.Ct. at 485-86; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556-57, 95 L.Ed.2d 89 (1987). Yet ERISA nowhere provides for personal shareholder liability. *See Cement & Concrete Workers District Council Welfare Fund v. Lollo*, 35 F.3d 29, 33 (2d Cir. 1994) (shareholders generally not liable under ERISA); *Sasso v. Cervoni*, 985 F.2d 49, 50 (2d Cir.) (same), *cert. denied*, 508 U.S. 973, 113 S.Ct. 2964, 125 L.Ed.2d 664 (1993). By changing remedies, § 630 would alter the incentives for employers to create and maintain ERISA plans, and thereby would affect ERISA plans in ways that Congress did not intend.

In sum, § 630 "makes explicit reference to ERISA plans," *Greenblatt*, 68 F.3d at 574, and significantly "affects ERISA plans in some manner," *Curiale*, 64 F.3d at 800. Put another way, the effect of § 630 on ERISA plans is not so "tenuous, remote or peripheral," *Shaw*, 463 U.S. at 100 n. 21 103 S.Ct. at 2901 n. 21, to save § 630 from preemption. *See also Greater Wash. Bd. of Trade*, 506 US. at 130 n. 1, 113 S.Ct. at 583 n. 1. Therefore, we hold that § 630 "relates to" ERISA plans, and is preempted by ERISA.

2. *Avoiding Multiplicity of Regulation*

Alternatively, even if § 630 were not preempted on the ground that it makes an explicit reference to ERISA plans,

we believe that § 630 is preempted because it would disserve the basic purpose of preemption in ERISA § 514, "namely 'to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.' " *Greenblatt*, 68 F.3d at 574 (quoting *Blue Cross*, —— U.S. at ——-——. 115 S.Ct. at 1677-78). Briefly, § 630 would hamper " 'the nationally uniform administration of employee benefit plans' " by providing " 'an alternative enforcement mechanism to [ERISA] § 502(a).' " *Greenblatt*, 68 F.3d at 574 (quoting *Blue Cross*, —— U.S. at ——-——. 115 S.Ct. at 1677-78). That conclusion follows from the analysis supporting our conclusion that Romney's cause of action under § 630 is "within the scope of the civil enforcement provisions" of ERISA § 502(a), to which we now turn.

B. *"Within the Scope of" ERISA § 502(a).*

Although we hold that § 630 is preempted by ERISA, that alone does not confer removal jurisdiction on the district court. *Metropolitan Life Ins.*, 481 U.S. at 63, 107 S.Ct. at 1546. We must also find that Romney's cause of action under § 630 is "within the scope of the civil enforcement provisions" of ERISA § 502(a), 29 U.S.C. § 1132(a). *Id.* at 66, 107 S.Ct. at 1547-48; *see also Greenblatt*, 68 F.3d at 573.

In determining whether a state-law cause of action is "within the scope of" ERISA § 502(a), we effectuate the underlying congressional policy for that provision. "Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA. . . ." *Ingersoll-Rand*, 498 U.S. at 144, 111 S.Ct. at 485. ERISA § 502(a) sets forth "a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556, 95 L.Ed.2d 39 (1987). This balancing "would be completely undermined if ERISA-plan partici-

pants and beneficiaries were free to obtain *remedies under state law that Congress rejected in ERISA*." *Id.* (emphasis added). Thus, in *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 10-11 (2d Cir.1992), we held that Connecticut common-law claims for breach of contract and negligent misrepresentation to enforce an oral promise to pay pension-related benefits were within the scope of ERISA § 502(a), because ERISA § 502(a)(1)(B) already provided a plan participant or beneficiary a cause of action to enforce his rights to pension benefits. In response to the plaintiff's argument that our ruling would leave him no adequate remedy, we explained that "[t]he effect of ERISA preemption is wholly to *eliminate state law claims* by benefit plan participants and beneficiaries, leaving them *only* the causes of action specifically provided in the statute's civil enforcement provisions." *Id.* at 11 (emphasis added).

Romney brought his claim under § 630 in order to collect delinquent contributions to ERISA plans that Goodee Fashions was obligated to pay. However, ERISA § 502(a) already provides a means for collecting delinquent ERISA contributions from employers. Under ERISA § 502(a)(3)(B), a plan fiduciary may sue to obtain any "appropriate equitable relief (i) to redress [violations of the terms of a plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3)(B). ERISA § 515 provides:

> Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145. Thus, ERISA § 502(a) already provides a cause of action to enforce employer contributions

to ERISA plans: a plan fiduciary may obtain relief for delinquencies pursuant to ERISA § 515.

ERISA, however, does not impose upon the shareholders of the employer corporation the *employer*'s statutory liability to make contributions. *Lollo,* 35 F.3d at 33; *Cervoni,* 985 F.2d at 50. Congress could have provided otherwise, but did not. Since Congress elected to impose no direct liability on shareholders for such contributions, permitting suits against shareholders under § 630 would reallocate the burdens and benefits of establishing and maintaining ERISA plans for a class of New York corporations, and afford those ERISA plans special and stringent means of civil enforcement. We hold that Romney's cause of action falls within the scope of ERISA § 502(a), and that the district court had removal jurisdiction. *See Metropolitan Life Ins.,* 481 U.S. at 62-64, 107 S.Ct. at 1545-47.

C. *Sasso v. Vachris.*

As the district court recognized, New York's highest court reached the opposite conclusion on the preemption issue in *Sasso v. Vachris,* 66 N.Y.2d 28, 32-35, 494 N.Y.S.2d 856, 858-60, 484 N.E.2d 1359, 1361-63 (1985). The principal grounds of decision in *Vachris* were: (1) that a series of cases had limited ERISA's preemption to state enactments that bear upon the "terms and conditions" of employee benefit plans; and (2) that § 630 is a remedial statute that adds an enforcement mechanism without changing the plans' "terms and conditions."

In *Rebaldo v. Cuomo,* 749 F.2d 133, 137 (2d Cir. 1984), *cert. denied,* 472 U.S. 1008, 105 S.Ct. 2702, 86 L.Ed.2d 718 (1985), we said that "a state law must 'purport[] to regulate, . . . the terms and conditions of employee benefit plans' to fall within the preemption provision," (quoting 29 U.S.C. § 1144(c)(2)). We drew that deduction from ERISA § 514(c)(2), which defines the word "State" (for purposes of ERISA § 514(a), *id.*

§ 1144(a)) as any state or local authority "which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." *Id.* § 1144(c)(2).

Relying on *Rebaldo, Vachris* held that § 630 was not preempted, principally because the New York statute did not purport to regulate the terms or conditions of employee benefit plans. 66 N.Y.2d at 32, 494 N.Y.S.2d at 858, 484 N.E.2d at 1361. However, in *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 141-42, 111 S.Ct. 478, 484-85, 112 L.Ed.2d 474 (1990), the Supreme Court specifically held that the ERISA definition of "State" does not control or narrow ERISA § 514(a)'s broad preemption of "all State laws insofar as they may now or hereafter relate to" ERISA plans:

> Had Congress intended to restrict ERISA's pre-emptive effect to state laws purporting to regulate plan terms and conditions, it surely would not have done so by placing the restriction in an adjunct definition section while using the broad phrase "relate to" in the pre-emption section itself.

Id. at 141, 111 S.Ct. at 484. We have since acknowledged that, in light of *Ingersoll-Rand,* further reliance on *Rebaldo* is unwarranted. *See, e.g., Travelers Ins. Co. v. Cuomo,* 14 F.3d 708, 719 (2d Cir.1993) ("*Rebaldo*'s fundamental premise was rejected by the Supreme Court"), *rev'd on other grounds sub nom., Blue Cross,* —— U.S. at ——, 115 S.Ct. at 1676; *see also Smith v. Dunham-Bush, Inc.,* 959 F.2d 6, 9 n. 3 (2d Cir.1992). The same "fundamental premise" that "poisoned" *Rebaldo*'s analysis, *Travelers Ins. Co.,* 14 F.3d at 719, afflicts *Vachris* as well.

The *Vachris* court also considered whether Congress intended to preempt statutes such as § 630 when Congress adopted the 1980 amendments to ERISA, which, *inter alia,* added a provision requiring employers to contribute to multi-employer plans in accordance with the plans themselves or pursuant to collective bargaining agree-

ments. *See* 29 U.S.C. § 1145. The *Vachris* court reviewed the legislative history, and found signs that Congress intended its 1980 ERISA amendments to supplement, rather then replace, state-law remedies. 66 N.Y.2d at 34-36, 494 N.Y.S.2d at 860-61, 484 N.E.2d at 1363-64. According to the *Vachris* court, the 1980 amendments "merely added a statutory obligation upon employers to make contributions . . . as required by the terms of the employee benefit plan or the collective bargaining agreement[.] and provided a civil cause of action in favor of fiduciaries to enforce this obligation." *Id.*, 66 N.Y.2d at 35, 494 N.Y.S.2d at 860, 484 N.E.2d at 1868 (citations omitted).

The problem with this particular line of analysis in *Vachris* is that it too is foreclosed by *Ingersoll-Rand*. There, the Supreme Court considered a Texas common-law cause of action for wrongful discharge based specifically on an employer's desire to avoid contributions to or payments from an employee's pension; the Court found that this cause of action was preempted by ERISA. 498 U.S. at 143-45, 111 S.Ct. at 485-86. Although the Texas cause of action was intended to afford heightened protection for ERISA beneficiaries, the Court characterized it as "conflict[ing] directly with an ERISA cause of action," because it "falls squarely within the ambit of ERISA § 510," *id.* at 142, 111 S.Ct. at 484-85, a substantive provision that is enforceable by ERISA § 502(a). *See* 29 U.S.C. §§ 1140, 1132(a).

The Court in *Ingersoll-Rand* made clear that state statutes that augment ERISA remedies are preempted, as well as state statutes that impair ERISA remedies:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.

Id. at 144, 111 S.Ct. at 485 (internal quotation marks and citations omited). The Supreme Court concluded that this exclusivity of remedy constituted "precisely the kind of special feature that warrants pre-emption" of what might otherwise be viewed as supplemental state remedies unavailable under federal law. *Id.* at 144, 111 S.Ct. at 485 (internal quotation marks and citations omitted). The Court drew no distinction between whether the state-law cause of action impacts on the original ERISA provisions or impacts only on subsequent amendments. In short, the remedies provided by ERISA § 502(a) are exclusive.

We have already said that ERISA §§ 502(a)(3)(B) and 515, 29 U.S.C. §§ 1132(a)(3)(B), 1145, together create a cause of action by which appropriate plaintiffs may enforce an employer's obligations to make contributions to employee benefit plans.[6] We think it is clear under *Ingersoll-Rand* that § 630 would interfere with the exclusivity of ERISA § 502(a) and is therefore pre-empted, notwithstanding *Vachris*.

D. *Additional Arguments.*

Two additional arguments by Romney deserve attention.

First, Romney argues that § 630 merely regulates the collection of judgments and thus does not augment civil

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[6] There is language in *Vachris* that may obscure whether § 630 is an alternative enforcement mechanism to ERISA § 502(*a*), an issue that became significant only later, in light of *Ingersoll-Rand*. The *Vachris* court incorrectly stated that subsection (*g*) of ERISA § 502, 29 U.S.C. § 1132(g)(2), gives fiduciaries a cause of action to enforce employer contributions. *See* 66 N.Y.2d at 35, 494 N.Y.S.2d at 860, 484 N.E.2d at 1363. That provision, however, only specifies the measure of relief that a court must give a plaintiff who successfully sues to enforce ERISA § 515, 29 U.S.C. § 1145; it thus assumes the existence of a cause of action, without creating it. The cause of action for enforcing employer contributions is actually provided by ERISA § 502(*a*)(3)(B), *id.* § 1132(a)(3)(B).

enforcement measures available under ERISA. *See Mackey v. Lanier Collection Agency & Serv. Inc.*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988); *Greenblat*, 68 F.3d at 574. However, the wording of § 630 imposes on shareholders a liability that otherwise would not exist. This reading is confirmed authoritatively by *Vachris*: "[S]ection 630 is remedial in nature: it *provides an additional enforcement mechanism* by which plaintiffs can recover delinquent contributions. . . . [T]he only effect of section 630 on employee benefit plans is to *give plaintiffs a cause of action to recover payments* the corporation was already obligated to provide." 66 N.Y.2d at 33-34, 494 N.Y.S.2d at 859, 484 N.E.2d at 1362 (emphasis added).[6] In this way, § 630 alters corporate liability principles by placing liability on other shoulders; it is not a mere mechanism for the collection of money judgments. That is implictly recognized by at least one New York court, which has held that a shareholder who is sued under § 630 must still "have his or her day in Court" and be free to litigate the existence of the debt, even though a suit under the statute is predicated on the existence of a judgment against the employer corporation that has been returned unsatisfied. *Matarazzo v. Segall*, 156 Misc.2d 1, 5, 600 N.Y.S.2d 890, 892 (Sup.1993) (mem.); *see* N.Y.Bus.Corp.Law § 630(a).

Second, Romney claims that ERISA preemption of the New York statute would hamper the operation of another federal scheme, because § 630 is supplementary to an action under LMRA § 301, 29 U.S.C. § 185(a). We disagree. LMRA § 301 involves the interpretation and enforcement of collective bargaining agreements. True, the employer contributions sought in this case arise from obligations in a collective bargaining agreement. How-

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[6] Although we are not bound by the *Vachris* court's holding on the federal issue of ERISA preemption, we follow of course that court's interpretation of the New York statute. *See Wisconsin v. Mitchell*, 508 U.S. 476, 483, 113 S.Ct. 2194, 2198, 124 L.Ed.2d 436 (1993).

ever, the fact that Romney or the Union finds a state statutes helpful in pursuing relief does not mean that the state staute is a necessary part of the federal scheme under LMRA § 301. After all, if the New York legislature repealed § 630 tomorrow (or had never enacted it in the first place), it could hardly be said that the congressional purposes underlying the LMRA would thereby be frustrated. Romney's reliance on our decision in *Abradco, Inc. v. Bevona,* 982 F.2d 82 (2d Cir. 1992), is misplaced. *Albradco* held that LMRA § 301 does not preempt § 630, because (1) the New York statute was a remedy for a right (determined by arbitration) that was independent of any collective bargaining agreement, and (2) resolution of the New York claim did not require an interpretation of a collective bargaining agreement. *Id.* at 87. But the fact that § 630 does not interfere with the interpretation or enforcement of collective bargaining agreements does not mean that the statute is necessary to carry out the congressional policies underlying LMRA § 301, and says nothing about whether the state statute interferes with the exclusive federal enforcement scheme in ERISA.

CONCLUSION

In sum, we hold that § 630 "relates to" ERISA (1) because it refers to ERISA plans, or, alternatively, (2) because it constitutes an "alternative enforcement mechanism" to ERISA § 502(a), *see Greenblatt,* 68 F.3d at 574. Therefore, § 630 is preempted by ERISA, 29 U.S.C. § 1144(a); *Greenblutt,* 68 F.3d at 573. We also hold that § 630 is "within the scope of the civil enforcement provisions" of ERISA § 502(a). *Metropolitan Life Ins.,* 481 U.S. at 66, 107 S.Ct. at 1547-48. The district court therefore had removal jurisdiction. *Id.,* 481 U.S. at 64, 107 S.Ct. at 1546-47. Since Romney's claim is preempted, however, the district court properly dismissed the complaint pursuant to Fed.R.Civ.P. 12(h)(6) for failure to state a claim upon which relief could be granted.

For these reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 94 Civ. 2842 (TPG)

EDGAR ROMNEY, Manager-Secretary, BLOUSE, SKIRT, SPORTSWEAR, CHILDREN'S WEAR & ALLIED WORKERS UNION, LOCAL 23-25, ILGWU,

Plaintiffs,

v.

ALAN LIN,

Defendant.

Aug. 23, 1995

OPINION

GRIESA, Chief Judge.

This is an action to collect unpaid contributions owed by Goodee Fashions, Inc. to four union benefit funds. The amount owed is $70,647.17. A judgment against Goodee was obtained in this amount. However, it appears that the amount cannot be collected from Goodee.

Suit is now brought under New York Bus. Corp. Law § 630, which provides that the ten largest shareholders of a corporation will be liable jointly and severally for all debts owing to employees, incuding amounts owed to benefit funds. Defendant Aan Lin was a principal shareholder of Goodee Fashions.

The action was originally brought in SupremeCourt, New York County. Defendant has removed the case to

the federal court on the ground that the claim is pre-empted by two federal statutes, ERISA and LMRA.

Plaintiff moves to remand. Defendant moves to dismiss. Plaintiff's motion is denied and defendant's motion is granted.

FACTS

The facts are not in dispute. On July 1, 1990 Goodee Fashions and the Union entered into a collective-bargaining agreement which, among other things, required Goodee Fashions to make contributions to four employee benefit funds: (1) the ILGWU National Retirement Fund, (2) the ILGWU Health Services Plan, (3) the ILGWU Health & Welfare Fund and (4) the Sportswear Industry Trust Fund. It is agreed between the parties that the first three of these are ERISA funds. Plaintiff alleges that the Sportswear Industry Trust Fund is not an ERISA fund. Plaintiff appears to be correct on the latter point, so that no federal defense would exist as to the amount owed to the Sportswear Industry Trust Fund. This amount is $598.27.

Between January 1, 1992 and June 30, 1992, Goodee Fashions failed to make its required contributions to the funds. Pursuant to the collective-bargaining agreement, the Union sought arbitration of the benefit contribution dispute. On October 9, 1992 the Union won a default arbitration award. The award was confirmed by a judgment in Supreme Court, New York County on April 22, 1993 for the sum of $70,647.17. Execution against Goodee Fashions, however, was returned unsatisfied.

DISCUSSION

ERISA Preemption

ERISA contains a provision entitled "Supersedure." This provision states that, with exceptions not here relevant, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any em-

ployee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). The question, under the statute, is therefore whether the state law *relates to* an employee benefit plan.

The statute here in question, N.Y.Bus.Corp.Law § 630, provides in relevant part as follows:

> (a) The ten largest shareholders . . . of every corporation . . ., no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees. . . .
>
> (b) For the purposes of this section, wages or salaries shall mean all compensation and benefits payable by an employer to or for the account of the employee for personal services rendered by such employee. These shall specifically include but not be limited to salaries, overtime, vacation, holiday and severance pay; employer contributions to or payments of insurance or welfare benefits; employer contributions to pension or annuity funds. . . .

Plaintiff relies on *Sasso v. Vachris,* 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985), in which the New York Court of Appeals held that § 630 is not preempted by ERISA. The Court in *Sasso,* however, based its decision on *Rebaldo v. Cuomo,* 749 F.2d 133, 137 (2d Cir.1984), which held that only state laws which "purport to regulate" the terms and conditions of an ERISA plan are preempted by ERISA. *Sasso* held that § 630 does not attempt to regulate the terms and conditions of ERISA plans, and merely has the effect of providing an additional remedy for recovering unpaid contributions due under such plans.

The reasoning of *Rebaldo* (and by implication *Sasso*) was rejected by the Supreme Court in *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). There the Supreme Court held that a state law may relate to a benefit plan, within the meaning of the supersedure clause of ERISA, even if the law is not specifically designed to affect such plans and even if the effect is only indirect. A state law relates to a plan "if it has a connection" to such plan, but does not so relate when its effect is merely "tenuous, remote or peripheral." *Shaw v. Delta Air Lines,* 463 U.S. 85, 96-97, 100 n. 21, 103 S.Ct. 2890, 2901 n. 21, 77 L.Ed.2d 490 (1983). The Second Circuit has acknowledged that the fundamental premise of *Rebaldo* has been rejected by the Supreme Court. *Travelers Ins. Co. v. Cuomo,* 14 F.3d 708, 719 (2d Cir.1993).

After considering these authorities, the court concludes that § 630 is preempted by ERISA. The question of whether shareholders of an employer are to be held liable for unpaid contributions to a benefit fund is a matter which surely "has a connection" to the benefit plan, and is not merely "tenuous, remote or peripheral." It must be acknowledged that the terminology both in § 1144 and in the cases interpreting it is not sharply precise. But the obvious intent of Congress was to enact a broad supersedure provision and the current case law gives the provision the intended scope.

In order for ERISA to preempt a state law it is not necessary that the state law contradict the federal law. However, § 630 does in fact contradict ERISA. ERISA contains a detailed provision regarding civil enforcement. 29 U.S.C. § 1132. This section describes proceedings that may be instituted by plan participants, beneficiaries, and fiduciaries, as well as by the Secretary of Labor, to enforce rights under ERISA. Actions may be brought against parties who are obligated under an ERISA plan, including an employer. 29 U.S.C. § 1145. ERISA does

not authorize any type of action against officers and stockholders of a corporate employer to recover contributions owed to an ERISA fund. *See Solomon v. Klein*, 770 F.2d 352 (3d Cir.1985).

It is important to note that the Second Circuit and the Southern District have recently held that § 1144 preempts a New York law similar to § 630—*i.e.*, the New York wage collection law, N.Y.Lab.Law § 198-c. *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir.1985); *aff'd sub nom. Roberts v. Burlington Industries, Inc.*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 558 (1986); *Calhoon v. Bonnabel*, 560 F.Supp. 101, 109 (S.D.N.Y. 1982).

LMRA Preemption

Defendant makes an additional argument to the effect that § 630 is preempted by § 301 of the LMRA, 29 U.S.C. § 185(a). The Second Circuit has recently held that § 630 is not preempted by LMRA § 301. *Albradco, Inc. v. Bevona*, 982 F.2d 82, 87 (2d Cir.1992).

Removal Jurisdiction

Although plaintiff's state court case was brought solely on a state law theory, the case was properly removed because of the preemption issues. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64, 107 S.Ct. 1542, 1546-47, 95 L.Ed.2d 55 (1987).

CONCLUSION

The state law upon which plaintiff's action is based is preempted by ERISA, and there is no valid cause of action against defendant under that statute. Plaintiff's claim for $70,647.17 is dismissed except for that portion of the claim relating to $598.27 owed to the Sportswear Industry Trust Fund.

The court cannot, on the basis of the submissions before it, determine the issue as to the claim for $598.27.

However, the court is confident that this part of the case will be settled. The court will confer with the parties on this one remaining matter and then enter judgment.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1602, Docket 95-9275

EDGAR ROMNEY, Manager-Secretary, BLOUSE, SKIRT, SPORTSWEAR, CHILDREN'S WEAR & ALLIED WORKERS UNION, LOCAL 23-25, ILGWU,
Plaintiff-Appellant,

v.

ALAN LIN,
Defendant-Appellee.

Petition for Rehearing
Sept. 10, 1996

Decided Jan. 16, 1997

Before: NEWMAN, Chief Judge, JACOBS, Circuit Judge, and CHATIGNY, District Judge.[1]

JACOBS, Circuit Judge:

Plaintiff-appellant Edgar Romney has filed a petition for rehearing on the grounds, *inter alia*, that our opinion in this case, 94 F.3d 74 (2d Cir.1996), conflicts both with a prior decision of this Court, *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561 (2d Cir.1995), and with the Supreme Court's recent decision in *Peacock v. Thomas*, —— U.S. ——, 116 S.Ct. 862, 133 L.Ed.2d

[1] The Honorable Robert N. Chatigny, of the United States District Court for the District of Connecticut, sitting by designation.

817 (1996). We conclude that our opinion is consistent with the precedent of this Circuit and with Supreme Court authority, and we therefore deny the petition for rehearing. In so doing, we issue this supplemental opinion to address the important questions concerning federal jurisdiction, ERISA preemption, and stare decisis raised by Romney's petition.[2]

A.

We assume familiarity with our opinion, reported at 94 F.3d 74, and that of the district court, *Romney v. Lin*, 894 F.Supp. 163 (S.D.N.Y.1995); we adduce only those matters necessary to dispose of the petition for rehearing.

Romney is a union official who, in March 1994, held an uncollected state court judgment against a corporate employer that had failed to make required contributions to employee benefit funds governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461.[3] In order to recover the delinquent contributions, Romney commenced a suit in New York State Supreme Court against one of the employer's principal shareholders (Alan Lin), pursuant to a state statute—N.Y.Bus. Corp. Law § 630 (McKinney 1986)—that authorizes suits to hold an employer's ten largest shareholders personally liable (under certain circumstances)

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[2] We find no merit to Romney's other arguments for rehearing and do not address them.

[3] The union (Blouse, Skirt, Sportswear, Children's Wear & Allied Workers Union, Local 23-25, ILGWU) and the employer (Goodee Fashions, a New York corporation) had entered into a collective bargaining agreement that obligated the employer to make contributions to three multiemployer ERISA funds. After the employer failed to make the required contributions during the first half of 1992, the union commenced arbitration proceedings (pursuant to the terms of the collective bargaining agreement) and won a default arbitration award on October 9, 1992. The award was confirmed by the New York State Supreme Court on April 22, 1993, at which time a judgment was entered against the employer in the amount of $70,647.17. Execution of the judgment was returned unsatisfied.

for such contributions, including "employer contributions to pension or annuity funds." The shareholders removed the collection action to the United States District Court for the Southern District of New York, pleading federal question jurisdiction on the ground that the state law cause of action was preempted by ERISA. In an opinion dated August 23, 1995, the district court denied Romney's motion to remand the case to state court, and granted the shareholder's motion to dismiss the complaint on the ground that ERISA preempted Romney's claim. *Romney*, 894 F.Supp. at 165-66.

Romney argued on appeal that the district court lacked subject matter jurisdiction to dismiss his suit. We rejected that contention and affirmed, holding that the district court did have removal jurisdiction (pursuant to 28 U.S.C. §§ 1331 and 1441), which allowed it to reach (and make) a determination that Romney's action was preempted by ERISA and should therefore be dismissed. *Romney*, 94 F.3d at 83-84. We concluded (1) that ERISA preempted suits under § 630, *id.* at 78-80 (a conclusion that Romney does not seriously dispute in his petition), and (2) that the district court had federal subject matter jurisdiction if Romney's § 630 action fell "within the scope of the civil enforcement provisions of ERISA § 502(a), 29 U.S.C. § 1132(a)." *Id.* at 80 (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66, 107 S.Ct. 1542, 1548, 95 L.Ed.2d 55 (1987)).

Romney's petition for rehearing primarily attacks our affirmative finding that his § 630 suit *does* fall within the scope of ERISA § 502(a). *Romney*, 94 F.3d at 80-81. He asserts that two recent opinions, *Peacock v. Thomas*, —— U.S. ——, 116 S.Ct. 862, 133 L.Ed.2d 817 (1996), and *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561 (2d Cir.1995), compel the conclusion that his action under § 630 was outside the scope of ERISA's civil enforcement provisions and that the district court therefore lacked subject matter jurisdiction.

B.

Romney offers two reasons why his action under § 630 is outside the scope of ERISA § 502(a), thereby depriving the district court of jurisdiction to dismiss his complaint: (i) § 630 authorizes—and the union expressly sought to enforce in this case—the collection of a money judgment from a third party; and (ii) his lawsuit did not set forth a violation of ERISA § 515, 29 U.S.C. 1145 (a common prerequisite to actions such as his under ERISA § 502(a)(3)), because the union could not allege that the shareholder defendant was an "employer" obligated to make pension fund contributions by contract.

Before we proceed further, it is important to make clear that, contrary to much of the language in the rehearing petition and in the Secretary of Labor's amicus brief, Romney's actions is not properly characterized as a suit to enforce a judgment. Section 630 creates personal liability of an employer's ten largest shareholders directly for the unpaid contributions. One element of a § 630 suit is "the return of an execution unsatisfied against the corporation upon a judgment recovered against it," but the suit is not one to enforce the unsatisfied judgment; it is a suit to collect the delinquent contributions.

As we pointed out in our initial opinion:

> [Section] 630 alters corporate liability principles by placing liability on other shoulders; it is not a mere mechanism for the collection of money judgments. That is implicitly recognized by at least one New York court, which has held that a shareholder who is sued under § 630 must still 'have his or her day in Court' and be free to litigate the existence of the debt, even though a suit under the statute is predicated on the existence of a judgment against the employer corporation that has been returned unsatisfied. *Matarazzo v. Segall,* 156 Misc.2d 1, 5, 600

N.Y.S.2d 890, 892 (App. Term 1993) (mem.); *see* N.Y. Bus. Corp. Law § 630(a).

As noted, Romney relies on *Peacock* as well as *Greenblatt* in aid of both arguments It is therefore useful to review both of those cases before stating our grounds for distinguishing them.

C.

In *Peacock*, an employee brought an ERISA class action in federal court against his employer for breach of fiduciary duty in administering an employee benefit plan. —— U.S. at ——, 116 S.Ct. at 865. The district court entered judgment against the employer in the amount of the unpaid benefits. *Id.* While the judgment was on appeal, an officer and shareholder of the employer company named Peacock settled many of the employer's accounts. *Id.* The employee failed to execute on the judgment pending appeal, and was unsuccessful in collecting on the judgment, after its affirmance by the court of appeals. *Id.* The employee thereafter sued Peacock personally in federal court, alleging fraudulent conveyance of the company's assets (to prevent satisfaction of the ERISA judgment), and later added a claim styled "Piercing the Corporate Veil Under ERISA and Applicable Federal Law." *Id.* at ——-——, 116 S.Ct. at 865-66. The district court did pierce the corporate veil, and entered a judgment against Peacock in "the precise amount of the judgment" against the employer (plus interest and fees). *Id.* at ——, 116 S.Ct. at 866. The court of appeals affirmed, holding that the district court had ancillary jurisdiction over the suit against Peacock. *Id.*

The Supreme Court framed the issue as "whether federal courts possess ancillary jurisdiction over new actions in which a federal judgment creditor seeks to impose liability for a money judgment on a person not otherwise liable for the judgment." *Id.* at ——, 116 S.Ct. at 865. The Court held that ERISA did not furnish

federal subject matter jurisdiction for the collection action against Peacock. First, the Court stated:

> We are not aware of, and Thomas does not point to, any provision of ERISA that provides for imposing liability for an extant ERISA judgment against a third party. *See Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833 [108 S.Ct. 2182, 2187, 100 L.Ed.2d 836] (1988) ("ERISA does not provide an enforcement mechanism for collecting judgments . . .").

—— U S. at ——, 116 S.Ct. at 866. Second, the Court rejected the claim that the collection action arose under ERISA § 502(a)(3), because the complaint in that second suit "alleged no violation of ERISA or of the [company's benefit] plan." *Id.* The Court explained that "[t]he wrongdoing alleged in the complaint"—Peacock's supposed fraudulent transfers—occurred "some four to five years after [the] ERISA plan was terminated," and concededly " 'did not occur with respect to the administration or operation of the plan.' " *Id.* (citation omitted). The Court concluded, therefore, that the employee had "failed to allege a claim under § 502(a)(3) for equitable relief": his veil-piercing claim—which was simply "a means of imposing liability on an underlying cause of action"—did not state a cause of action under ERISA and could not "independently support federal jurisdiction . . . [absent an] alleg[ation of] a violation of an ERISA provision or term of the plan." *Id.* (internal quotations and citations omitted).

Greenblatt was a suit on behalf of employee benefit funds against a surety that had issued a bond (required under a collective bargaining agreement) securing the obligation of a union employer to make benefit payments to the funds. *See* 68 F.3d at 567. The employer defaulted, and the plaintiffs sued on the bond. *Id.* The district court denied the surety's motion to dismiss for lack of subject

matter jurisdiction, and entered judgment against the surety. *Id.* The surety appealed, and this Court issued an opinion addressing "whether the district court had jurisdiction by virtue of . . . preemption of state law" under ERISA. *Id.*

The *Greenblatt* Court stated (as we said in *Romney*) that "for the district court to have jurisdiction by virtue of ERISA preemption," there must be findings both that (1) ERISA preempted the state law cause of action, and (2) the state claim was "within the civil enforcement provisions of ERISA" § 502(a). *Id.* at 573. The *Greenblatt* Court concluded that, because it could not make the latter finding, federal jurisdiction could not be based on ERISA preemption.

First, the *Greenblatt* Court found that the "claim on the bond . . . d[id] not conflict with any enforcement mechanism specified in ERISA," and therefore did not warrant preemption under *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), in which "[t]he existence of a [pension] plan and the employer's pension-defeating motive were *elements of the cause of action.*" *Greenblatt,* 68 F.3d at 574-75 (emphasis added). Second, *Greenblatt* did not involve "direct assumption of the employer's functions with regard to the administration of [an ERISA] plan," but only a contractual relationship "by which the surety guaranteed payment of a certain sum if the [employer] defaulted on its obligations." *Id.* at 575-76. The surety, therefore, was "not itself directly obligated under the terms of the collectively bargained agreement to make any contributions; its obligations ar[o]se solely under the bond." *Id.* at 576.

In sum, both *Peacock* and *Greenblatt* held that federal jurisdiction was lacking because the state law cause of action at issue did not fall within the civil enforcement provisions of ERISA § 502(a): the state causes of action

did not depend upon (i) the existence of an ERISA plan and (ii) the defendants' failure to comply with the obligations that ERISA imposes on employers (or others subject to ERISA). In *Peacock*, the enforcement action depended only on the existence of the judgment, and in *Greenblatt*, the surety action depended only on the contingency of default under the bond.

D.

Romney's petition describes his § 630 action as a "state court proceeding to enforce the collection of a judgment." In so doing, the petition mischaracterizes Romney's own lawsuit. As we have noted, his is not a suit to collect a judgment; it is a suit to collect directly from the shareholders the delinquent contributions that the corporate employer has not paid. Building on that mischaracterization, Romney argues that our opinion "overlooked the *Peacock* holding that actions to collect judgments against third parties do not fall within ERISA § 502(a)." Petition for Rehearing at 4. In its only relevant reference to "third parties," the *Peacock* Court said that no "provision of ERISA . . . provides for imposing liability for an extant ERISA judgment against a third party." —— U.S. at ——, 116 S.Ct. at 866. That principle controlled *Peacock*, which involved an attempt to enforce an extant ERISA judgment by way of a garden-variety state law collection action. But Romney's claim is not a true analogue of the claim in *Peacock*.

The shareholder in this case did not claim that Romneys suit was preempted because it duplicated (or conflicted with) a *judgment collection* provision found in ERISA; he claimed that Romney's § 630 action—a suit to recover benefit payments owed to employees—conflicted with (or fell "within the scope of") the *civil enforcement* provisions of ERISA § 502(a), which governs, *inter alia*, private actions to recoup pension fund contributions. Our

original opinion concluded that Romney's lawsuit under § 630 constituted a state law instrument for recovering overdue employee benefits, and that it therefore fell within the scope of ERISA § 502(a). *See Romney,* 94 F.3d at 81. In explaining why such a cause of action satisfied the requirements of ERISA preemption, we emphasized that Romney's suit was *not* in the nature of a third-party collection action (at issue in *Peacock*):

> Romney brought his claim under § 630 in order to collect delinquent contributions to ERISA plans that Goodee Fashions was obligated to pay. However, ERISA § 502(a) already provides a means for collecting delinquent ERISA contributions from employers. Under ERISA § 502(a)(3)(B), a plan fiduciary may sue to obtain any "appropriate equitable relief (i) to redress [violations of the terms of a plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132 (a)(3)(B). ERISA § 515 provides:
>
> > Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.
>
> 29 U.S.C. § 1145. Thus, ERISA § 502(a) already provides a cause of action to enforce employer contributions to ERISA plans: a plan fiduciary may obtain relief for delinquencies pursuant to ERISA § 515.
>
> ERISA, however, does not impose upon the shareholders of the employer corporation the *employer*'s statutory liability to make contributions. [*Cement & Concrete Workers District Council Welfare Fund v.*] *Lollo,* 35 F.3d [29] at 33 [(2d Cir.1994)];

> [*Sasso v.*] *Cervoni,* 985 F.2d [49] at 50 [(2d Cir. 1993)]. Congress could have provided otherwise, but did not. Since Congress elected to impose no direct liability on shareholders for such contributions, permitting suits against shareholders under § 630 would reallocate the burdens and benefits of establishing and maintaining ERISA plans for a class of New York corporations, and afford those ERISA plans special and stringent means of civil enforcement. We hold that Romney's cause of action falls within the scope of ERISA § 502(a), and that the district court had removal jurisdiction. *See Metropolitan Life Ins.,* 481 U.S. at 62-64, 107 S.Ct. at 1545-47.

Romney, 94 F.3d at 81 (emphasis in original).

Peacock is therefore inapposite. Nothing in Romney's petition persuades us otherwise.

E.

Romney's second noteworthy argument on rehearing is that our opinion "is inconsistent with the *Peacock* and *Greenblatt* holdings that an action does not fall within ERISA § 502(a)(3) if the plaintiff does not assert a violation of a provision of ERISA or of a plan." Petition for Rehearing at 6. However, Romney's complaint *does* specifically allege that "[t]he [employer] *Corporation* did not . . . pay the [required] contributions to the Funds that were owed to the [employees]," thus "accru-[ing] a debt to the [employees]," Complaint ¶¶ 7, 8 (emphasis added); and Romney could not have pursued his lawsuit against the shareholder absent this criitcal allegation of fault by the employer. Just as in *Ingersoll-Rand Co. v. McClendon,* where "[t]he existence of a [pension] plan and the employer's pension-defeating motive were elements of the cause of action," *Greenblatt,* 68 F.3d at 574-75, an action under § 630 has the following elements:

(1) a "debt[]"—defined to include "employer contributions to pension or annuity funds"—"due and owing to any of [the corporation's] laborers, servants or employees . . . for services performed by them for such corporation"; and (2) "an execution unsatisfied against the corporation upon a judgment recovered against it for such services." N.Y. Bus.Corp. Law §§ 630(a) and (b).

As our initial opinion makes clear, § 630 "impose[s] upon the shareholders . . . the *employer*'s statutory liability to make [employee benefit] contributions." *Romney*, 94 F.3d at 81 (emphasis in original). Romney contends that his § 630 lawsuit falls outside the scope of ERISA § 502(a) (and thus fails to confer federal jurisdiction) because his complaint "does not set forth [an ERISA] violation . . . [by] claim[ing] that the *Shareholder* is an employer contractually obligated to make contributions." Petition for Rehearing at 3 (emphasis added). That argument fails because Romney alleges "violations of ERISA" by the corporate *employer*, even more important, the violations he alleges are ones for which the corporation's *shareholders* are expressly held accountable by § 630.

Romney's § 630 action thus falls squarely within the Supreme Court's "conflict preemption" doctrine, under which the preemptive effect of § 502(a) is held to be "so complete that an ERISA pre-emption defense provides a sufficient basis for removal of a cause of action to the federal forum." *Ingersoll-Rand*, 498 U.S. at 145, 111 S.Ct. at 486. New York's § 630 is just like the Texas cause of action at issue in *Ingersoll-Rand*, because the state statute "[u]nquestionably . . . purports to provide a remedy for the violation of a right expressly guaranteed by [ERISA] and exclusively enforced by § 503(a)." *Id.*

The difference between Romney's action and those in *Peacock* and *Greenblatt* is therefore apparent. In *Peacock*, the basis for the defendant's liability was the state's vel-piercing doctrine. In *Greenblatt*, the basis for the de-

fendant's liability was a surety contract. Veil-piercing and surety law are principles of general applicability, within a state's traditional purview, that bear on employment benefits only insofar as the underlying transactions happen to involve employment benefits. ERISA does not create federal law on veil-piercing (whether or not the veil pierced is that of a corporation that has been an employer subject to ERISA), or on the enforcement of judgments generally. Nor does ERISA create federal law on the enforceability of surety contracts (whether or not the bond secures obligations that the employer owned under ERISA.

The actions in *Peacock* and *Greenblatt,* based on generally applicable state law, did not warrant complete "conflict preemption" under ERISA. *See Mackey v. Lanier Collection Agency & Serv., Inc.,* 486 U.S. 825, 841, 108 S.Ct. 2182, 2191, 100 L.Ed.2d 836 (1988) (action to collect judgments against ERISA plan participants under state's general garnishment statute not preempted by ERISA). The action on the surety contract in *Greenblatt,* for example, furnished a mechanism for recovering an ERISA liability only because the underlying obligation—created without the state's mandate or influence—was an ERISA obligation. *Compare Ingersoll-Rand,* 498 U.S. at 139, 111 S.Ct. at 483 (federal jurisdiction based on ERISA preemption is appropriate because "[w]e are *not* dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan") (emphasis added).

In this case, however, a true conflict arises because the relevant sections of ERISA specify who must (and by implication, who need not) fulfill the employer's obligation to pay ERISA benefits, while the state law designates who *else* must fulfill that obligation (placed by ERISA on employers only). In other words, the state-imposed obligation is the very obligation to make payments that

ERISA requires, and the state law itself designates new ERISA obligors. Thus, the basis for Romney's liability is an obligation that ERISA imposes on someone else. Such a situation plainly constitutes complete "conflict preemption" conferring federal jurisdiction under ERISA.

Romney's petition does not alter our view, expressed in our initial opinion, that § 630 conflicts with—and thereby falls within—ERISA § 602(a), by "reallocat[ing] the burdens and benefits of establishing and maintaining ERISA plans for a class of New York corporations, and afford[ing] those ERISA plans special and stringent means of civil enforcement." *Romney*, 94 F.3d at 81. Indeed, we addressed the substance of Romney's present arguments in our opinion:

> Romney argues that § 630 merely regulates the collection of judgments and thus does not augment civil enforcement measures available under ERISA. *See Mackey v. Lanier Collection Agency & Serv. Inc.*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988); *Greenblatt*, 68 F.3d at 574. However, the wording of § 630 imposes on shareholders a liability that otherwise would not exist. This reading is confirmed authoritatively by [*Sasso v.*] *Vachris*[, 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985)]: "[S]ection 630 is remedial in nature; it *provides an additional enforcement mechanism* by which plaintiffs can recover delinquent contributions. . . . [T]he only effect of section 630 on employee benefit plans is to *give plaintiffs a cause of action to recover payments* the corporation was already obligated to provide." 66 N.Y.2d at 33-34, 494 N.Y.S.2d at 859, 484 N.E.2d 1359 (emphasis added).

Romney, 94 F.3d at 83 (emphasis in original) (footnote omitted). Once again, nothing in Romney's petition for rehearing alters our previous views.

Though we are confident, for the reasons set forth, that Romney's state law claim is preempted by ERISA, we acknowledge that whether his suit is "within the scope" of § 502(a) for purposes of the complete pre-emption doctrine is a close question.[4] The suit alleges an ERISA violation *by* the corporate employer, but it is not brought *against* a party made liable by ERISA. That distinction obliges us to consider the meaning of the Supreme Court's phrase "within the scope" of § 502(a).

The phrase first appeared, in the context of the Court's development of the complete preemption doctrine, in *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California,* 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983):

> It may be that, as with § 301 as interpreted in *Avco* [*Corp. v. Aero Lodge No. 735, Int'l Assn. of Machinists,* 390 U.S. 557 [88 S.Ct. 1235, 20 L.Ed.2d 126] (1968)], any state action coming within the scope of § 502(a) of ERISA would be removable to federal district court, even if an otherwise adequate state cause of action were pleaded without reference to federal law.

Franchise Tax Board, 463 U.S. at 24, 103 S.Ct. at 2854 (footnote omitted). The Court did not decide whether the complete preemption doctrine applied to ERISA because California's suit to collect taxes was not within the scope of ERISA.

Four years later, the Court resolved the issue posed in *Francise Tax Board* and ruled that the complete preemption doctrine applies to ERISA, so long as the suit claimed to be preempted is "within the scope" of § 502(a). *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 64, 66, 107 S.Ct. 1542, 1548, 95 L.Ed.2d 55 (1987). The "scope"

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[4] Chief Judge Newman is the author of the concluding portion of this opinion.

question was an easy one in *Metropolitan Life* since the suit "by a beneficiary to recover benefits from a covered plan . . . f[ell] directly under § 502(a)(1)(B) of ERISA." *Id.* at 62-63, 107 S.Ct. at 1546. *Metropolitan Life* thus shed little light on how far the Court might go in deeming a suit to be "within the scope" of § 502(a). That decision makes clear, however, that even though a suit is preempted by ERISA, it is not necessarily within federal court jurisdiction. There are thus some cases in which a state law cause of action is preempted, but only a state court has jurisdiction to so rule. That is the inevitable consequence of two circumstances: (a) the general unavailability of a federal forum to adjudicate a federal defense (*e.g.*, preemption) and (b) the Supreme Court's establishment of the "scope" requirement, instead of applying the *Avco* version of the complete preemption doctrine to ERISA.

Having formalized the "scope" requirement in *Metropolitan Life*, the Court has had no occasion since that decision to elucidate its meaning. Plainly, the Court cannot have meant that the only suits "within the scope" are those that are so completely within the four corners of ERISA as to be *winning* ERISA claims, since the "scope" inquiry arises only as to claims that are *defeated* by ERISA's preemption provision. We think a suit that alleges an ERISA violation can be within the scope of ERISA, even though it is directed against a defendant not liable under ERISA, and that Romney's suit is within the scope of § 502(a). Unlike the claim in *Franchise Tax Board*, where "the State's right to enforce its tax levies is not of central concern to the federal statute," 463 U.S. at 25-26, 103 S.Ct. at 2855, Romney's suit to collect ERISA contributions is very much of central concern to the federal statute. Moreover, whereas the Supreme Court noted that "ERISA does not provide an alternative cause of action in favor of the State to enforce its [tax] rights," *id.* at 26, 103 S.Ct. at 2855, ERISA explicitly provides such a cause of action for Romney, at least vis à vis the

employer. Finally, we note that our *Greenblatt* decision, in rejecting federal jurisdiction, observed that in that case we were "not dealing with any type of agency or ownership," 68 F.3d at 575, whereas the defendant sued by Romney is precisely in an ownership relationship.

These distinctions from claims not within the scope of ERISA suffice to make Romney's claim one for which it is entirely appropriate that a federal court make the preemption ruling.

For all of these reasons, the petition for rehearing is denied.

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No. 96-1647

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EDGAR ROMNEY, Manager-Secretary, Blouse, Skirt, Sportswear, Children's Wear & Allied Workers Union, LOCAL 23-25, ILGWU,
Petitioner,

v.

ALAN LIN,
Respondent.

On Petiiton for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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---

MOTION BY THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Building and Construction Trades Department, AFL-CIO, hereby moves for leave to file the accompanying brief *amicus curiae* in support of the petitioner in the above-styled case. The petitioner has granted his consent; the respondent, however, has denied his consent. In support of this motion the movant shows as follows:

1. The Building and Construction Trades Department, AFL-CIO, represents more than three million laborers

and mechanics employed in the construction industry throughout the United States, and fifteen national and international labor unions, many of whose members are employed in the construction industry.

In its most particularized terms, the instant case concerns the preemptive effect of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1000 *et seq.* ("ERISA"), on a New York statute that holds the principal shareholders of closely-held corporations secondarily liable for certain kinds of debts the firm has incurred where the firm itself is judgment proof.

At the same time the decision below is of a piece with the lower court ERISA preemption decisions addressed to the cognate state laws—providing for "mechanics" liens—that, like "shareholder liability" laws, provide a measure of security to those who provide goods and services to construction contractors in exchange for a promise of later payment.

Indeed, the litigation that has generated this body of lower court decisions has, for the most part, arisen in the building and construction industry. And, it is that industry—and its workers—which have felt the heaviest brunt of the decisions giving ERISA's preemption provision what this Court's most recent ERISA preemption decisions through *California Division of Labor Standards v. Dillingham Construction Co.*, —— U.S. ——, 65 L.W. 4097 (Feb. 18, 1997), reveal to be an overly broad reading.

2. Against this background the interest of the Building and Construction Trades Department and its construction industry members could not be more immediate. And, consistant with that interest, in the *amicus curiae* brief attached hereto the Department seeks to put the question presented by the *certiorari* petition in its broader context, to outline the path of development of the construction industry ERISA preemption cases, and to identify both the internal inconsistencies in the lower court

law and the tension between the majority view in the lower courts and this Court's view on the scope and nature of ERISA preemption. All of that, we submit, underlines the need for review of the decision below by this Court and for a grant of *certiorari* here.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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OCTOBER TERM, 1996

No. 96-1647

EDGAR ROMNEY, Manager-Secretary, Blouse, Skirt, Sportswear, Children's Wear & Allied Workers Union, LOCAL 23-25, ILGWU,

Petitioner,

v.

ALAN LIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

The Building and Construction Trades Department, AFL-CIO, files this brief *amicus curiae* contingent on the granting of the foregoing motion for leave to file said brief, as provided for in the Rules of this Court. The interest of the *amicus curiae* in this case is set out in that motion.*

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* No counsel for a party authored this brief *amicus curiae* in whole or in part and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its most particularized terms, the instant case concerns the preemptive effect of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1000 *et seq.* ("ERISA"), on a New York statute that holds the principal shareholders of closely-held corporations secondarily liable for certain kinds of debts the firm has incurred where the firm itself is judgment proof.

But precisely because that New York law is only one variation on a larger legislative theme—providing suitable protections to those who contract with small, thinly capitalized firms to provide goods and services, and who then provide such goods and services, in exchange for later payments by the firm—the ERISA preemption question presented here is of far greater import and the ramifications of the decision below are far more widespread.

The decision below is of a piece with a body of lower court law addressing that larger legislative theme. And, as the *certiorari* petition shows, that lower court law has developed in fits and starts, is marked by discord and conflict, is shot through with anomalies and, more often than not, calls for the invalidation of state laws on an understanding of ERISA preemption profoundly at odds with this Court's most recent ERISA preemption decisions —*John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86 (1993); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. ——, 115 S.Ct. 1671 (1995); and *California Division of Labor Standards v. Dillingham Construction Co.*, —— U.S. ——, 65 L.W. 4097 (Feb. 18, 1997).

The litigation that has generated this body of lower court law has, for the most part, arisen in the building and construction industry. And, it is that industry—and its workers—which have felt the heaviest brunt of the decisions giving ERISA's preemption provision what *John Hancock, Travelers* and *Dillingham* reveal to be an overly broad reading.

That being so, it is the purpose of this brief *amicus curiae* to put the question here in its broader context.

We begin by reviewing the characteristics of the construction industry which have given rise to the need to protect those who do business with construction contractors and the legislative solution that every state has arrived at—the "construction" or "mechanics" lien.

We then trace the path of development of the construction industry ERISA preemption cases—which has paralleled the development of the lower-court law with respect to "shareholder liability" laws—and show that the majority view in the lower courts with respect to both mechanics lien, and shareholder liability, laws is at war with this Court's current understanding of the sweep of ERISA preemption as stated in *John Hancock, Travelers,* and *Dillingham.*

Finally, we show that the lower court law—both as to mechanics lien, and shareholder liability, laws—has the anomalous result of affording ERISA-covered benefits a disfavored status; draws arbitrary lines between preempted and non-preempted state causes of action; and overrides state law absent any conflict with ERISA's policies, any theory as to why Congress would have intended to displace state law, or any evidence of such a quixotic congressional intent.

All this, we submit, underlines the need for review of the decision below by this Court and for the grant of *certiorari* here.

ARGUMENT

1. The building and construction industry—like, *e.g.,* the garment industry out of which the instant case arises—is populated by vast numbers of small enterprises. There are, for eample, approximately 525,000 construction firms in the United States, of which 425,000 (81.0%) have fewer that 10 employees. Indeed, the average construction enterprise—even taking into account the relative handful of large employers—employs 7.4 employees; for

the firms with fewer than 10 employees, the average is just 2.7 workers.[1]

These small firms tend to be thinly capitalized; indeed, most often the workers even supply their own tools. Yet the firms often handle large contracts and incur large obligations—to suppliers of material, to subcontractors, and to their employees. All too often the firms vanish, sometimes for legitimate, and sometimes for not-so-legitimate, reasons. And, because the firms take the corporate form, when the legal entity ceases to exist or becomes judgment-proof, traditional corporate law would leave suppliers, subcontractors, and workers without recourse.

The New York law at issue here represents an attempt to address this problem in terms that span industry lines through the creation of a secondary, shareholder liability for any judgment-proof, closely-held corporation. The law governing comparable contractual relations in the construction industry has generated a cognate, industry-specific approach: the "construction" or "mechanics" lien.

"A mechanics lien is a statutory lien on real estate which provides security for the payment for labor or materials." 53 Am. Jur. 2d, *Mechanics Liens* § 3 (1996). These liens originated in early England. *Fifty State Construction Lien and Bond Law* iii (R. Cushman ed. 1992) (hereinafter "*Fifty State*"). And, in the United States, mechanics liens have been recognized almost as long as the Republic. *See Winder v. Caldwell*, 55 U.S. (14 How.) 434, 436-37 (1852) (discussing Maryland's 1791 Act and the District of Columbia's 1833 law). At least by the end of World War II, "practically all, if not all, of the states" had enacting mechanics lien laws. 37 C.J.S. *Mechanics Liens* § 3 (1948 ed.). "The theory and purpose of [these] statutes are to protect persons who have, in good faith, contributed labor or material to the construction, improvement, or repair of a building or other

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[1] Commission on the Future of Worker-Management Relations, *Fact Finding Report* at 95 (May, 1994).

structure, thereby enhancing the value of the land, by according them security for their compensation independent of the account of indebtedness between the owner and the contractor." *Id.*

2. Like the New York shareholder liability law at issue here, mechanics lien laws—and other supplementary statutes enacted for the benefit of obligees of construction firms—have come under ERISA preemption attack.[2] The lower court ERISA preemption law with respect to these related statutory responses to a single problem has developed in tandem. The earliest lower court cases—on shareholder liability laws like the New York statute and on construction industry-specific mechanics lien statutes—looked with favor on the continued vitality of the state law. For example, in *Carpenters Health and Welfare Fund v. Ken P. Ambrose Inc.*, 727 F.2d 279, 282 n.5 (3rd Cir. 1983), the Third Circuit sustained against an ERISA challenge a Pennsylvania shareholder liability law quite similar to the New York statute at issue here. One year later, the Ninth Circuit suggested—without finally deciding—that a mechanics lien law would survive ERISA preemption challenge. *Carpenters Southern California Administration Corp. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984). *See also Carpenters Southern California Admin. Corp. v. D & L Camp Constr. Co.*, 738 F.2d 999 (9th Cir. 1984) (surety law) (semble).

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[2] Mechanics liens generally can only be placed upon privately-owned, as distinguished from public, land; as a result, states generally require construction firms working on public projects to take out a surety bond to protect their suppliers and employees in the event the firm becomes judgment proof. *See generally Fifty States.* In addition, at least four states have enacted "stop notice" laws which, in a variety of ways, permit unpaid workers and suppliers to stop payments or loan disbursements to a construction firm pending payment by that firm of its obligations. *See Fifty States* 3.17 (Alaska), 6.7 (California), 31.5 (New Jersey), 32.19 (New Mexico).

The leading cases concern the preemption *vel non* of these types of laws, as well as the conventional mechanics lien law, are cited in Table 1 to the *certiorari* petition, Pet. 22-25.

The course of the law began to shift, however, when this Court issued its first series of ERISA preemption decisions. For those decisions indicated that ERISA displaces any and all state laws having "a connection with or reference to" a pension, or health and welfare, plan. *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1963).

In the wake of those decisions, the Third Circuit overturned its decision in *Ambrose, supra*, and held the Pennsylvania shareholder liability law preempted on the ground that "[w]e do not believe that . . . *Ambrose* can survive *Shaw* and *Metropolitan Life* [*Insurance Co. v. Mass.*, 471 U.S. 724 (1985)]." *McMahon v. McDowell*, 794 F.2d 100, 107-08 (3rd Cir. 1986).

The Ninth Circuit took the same approach with respect to its earlier decisions concerning mechanics lien laws, concluding that "the broad language of the Supreme Court . . . placed the continuing validity of our earlier holdings in serious doubt" and required "a much broader reading of the ERISA preemption provision that we recognized." *Trustees of Electrical Workers Health & Welfare Trust v. Marjo Corp.*, 988 F.2d 865, 867-68 (9th Cir. 1992). And, at least four circuits have now held that mechanics lien, and related, laws are preempted by ERISA.[3]

All those decisions preceded this Court's reexamination of its ERISA preemption doctrine beginning in *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86 (1993). As Justice Scalia has noted the more recent cases represent a "new approach"—and a

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[3] *Bricklayers Local 33 Benefit Funds v. America's Marble Source Inc.*, 950 F.2d 114 (3d Cir. 1991) (stop notice); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548 (5th Cir.), *cert. denied*, 497 U.S. 10245 ((1990) (mechanics lien); *Sturgis v. Herman Miller, Inc.*, 943 F.2d 1127 (9th Cir. 1991) (same); *McCoy v. MIT*, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992) (same).

more searching approach—to ERISA preemption, *Dillingham, supra,* 65 L.W. at 4103 (concurring opinion)--an approach founded in the realization that, as *Travelers, supra,* states, "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.' " 115 S. Ct. at 1677.

The decision earlier this Term in *Dillingham*—a decision which, of course, post-dates the decision below—is especially instructive. There, the Court reversed the Ninth Circuit's invalidation, on ERISA preemption grounds, of a California statute setting a sub-minimum wage for apprentices who are enrolled in state certified apprenticeship programs and are working on public works projects—and *only* such apprentices—even though that law has a plain connection to, and necessary effect on, ERISA apprenticeship plans. But, notwithstanding that relation, "[t]he wages to be paid on public works projects . . . are . . . quite remote from the areas with which ERISA is expressly concerned" and are in "an area of traditional state regulation." 65 L.W. at 4101, 4102. Given that, given that the state law did not "bind ERISA plans to anything," and given the "paucity of indication in ERISA and its legislative history of any intent on the part of Congress to preempt state apprenticeship training standards, or state prevailing wage laws that incorporate them," the Court held that the "tenuous . . . relation" between the state law and ERISA plans is not a sufficient basis to hold that state law to be preempted by ERISA. *Id.*

Not surprisingly, this Court's reevaluation of the ERISA preemption doctrine has caused a number of state courts to take a second look at whether mechanics liens—and other laws whose only effect is to regulate the contractual relations between employing entities and employees in a manner that does not affect the substantive terms of these contracts but only the options for enforcement and "the money available for payment," *Seaboard Surety Co.*

v. Indiana State District Council of Laborers, 645 N.E.2d 1121, 1127 (Ind. App. 1995)—are, indeed, preempted by ERISA. This development is summarized in the *certiorari* petition at pp. 14-15.

As the *certiorari* petition so clearly shows, the result has been to heighten the discord in the state court and federal appellate court law. That discord is perhaps best demonstrated by the fact that the Second Circuit and the New York Court of Appeals have reached precisely the opposite conclusion as to whether the very statute at issue here is preempted by ERISA. *See* Pet. 11-12.

3. The lower court law in this area is not simply discordant; it is, moreover, incoherent—riddled with anomalies and internal inconsistencies which only this Court can resolve.

(a) The first anomaly is that the lower courts, in addressing both shareholder liability, and mechanics lien, laws, have read ERISA to afford ERISA-covered benefits a *disfavored* status. Mechanics liens, for example, can still be used to collect payments for materials supplied to a contractor, or to collect payments of wages or non-ERISA benefits for labor provided to the contractor. But such liens cannot be used secure unpaid contributions for fringe benefits owed on account of the very same labor.

Similarly, under the decision below, employees of a judgment-proof, closely-held New York corporation who are owed back wages and any benefits not covered by ERISA are free to seek to recover those wages and benefits from the principal shareholders. But the New York law cannot be used to recover that part of the contractual promise that involves the payment of ERISA benefit contributions for the labor that has been performed.

This anomaly is compounded by the Second Circuit's holding in *Albradco, Inc. v. Bevona,* 982 F.2d 82 (2d Cir. 1992), that the New York law is *not* preempted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. That decision, when coupled with the decision in the instant case, means that a union which

has collectively bargained for wages and benefits with a firm which has become judgment proof could sue on the state law to recover the contractually-specified wages and benefit contributions without running afoul of § 301 preemption law, but that suit is blocked by the ERISA preemption doctrine with regard to the promised ERISA benefit contributions. And, the Second Circuit has reached these results notwithstanding the fact that ERISA preemption was largely "modeled after § 301 of the LMRA." *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 51, 55 (1987).

(b) The court of appeals here—like the courts in the mechanics lien cases—justified its decision to preempt the New York law as that law applies to ERISA benefits largely on the ground that "the relevant sections of ERISA specify who must (and by implication, who need not) fulfill the employer's obligation to pay ERISA benefits, while the state law designates who *else* must fulfill that obligation (placed by ERISA on employers only)." Pet. App. 35a. Yet as a result of this Court's decision last Term in *Peacock v. Thomas,* —— U.S. ——, 116 S.Ct. 862 (Feb. 21, 1996)—which teaches that there is no basis in ERISA for the assertion of federal jurisdiction over state-law proceedings to enforce ERISA judgments—it seems clear that, at least in the context of proceedings to enforce an ERISA judgment, state law *may* determine "who else must fulfill [a contribution] obligation."

The court of appeals attempted to square its holding with *Peacock* by stressing that under the law at issue here—and in contrast to a judgment-enforcement proceeding—the plaintiff must prove up the firm's default on a benefit contribution obligation and thus must prove, as an element of the state-law claim, facts that would constitute an ERISA violation as well. *See* Pet. App. 16a-17a. Yet the court below—in line with other circuits—has itself held that a state law action on a surety bond to collect ERISA benefit contributions is *not* preempted even though the plaintiff in such an action must "prove as an element of its claim on the bond that [the

employer] had defaulted on its obligations." *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 570 (2d Cir. 1995).

The court of appeals thus would have it that the states are *not* preempted from imposing state-created rules of secondary liability beyond the corporate entity for pension or welfare contributions (*Peacock*); that the states are *not* preempted from adjudicating failure-to-contribute claims in the course of enforcing surety promises (*Greenblatt*); but that the states *are* somehow preempted from adjudicating such claims in the course of enforcing state-created secondary liabilities beyond the corporate entity. To this it is appropriate to recall that Holmes did not say that the law has to be illogical.

(c) All of this, in our view, is merely a prelude for what we submit is the largest anomaly in the lower court majority view.

As we have seen, the courts of appeals—on reasoning quite similar to the reasoning of the court below—have held that, outside of the judgment-enforcement context, ERISA displaces all state laws, including mechanics lien laws, which extend liabilities for ERISA contributions or ERISA benefits beyond the corporate entity that promised to make the payments. Since preemption is ultimately a matter of congressional intent, these courts necessarily have concluded that Congress in enacting ERISA intended to turn the clock back 200 years and effectively repeal the mechanics lien laws which were such a fundamental part of the legal landscape when ERISA was enacted.

No court, so far as we are aware, has ventured any theory as to why Congress might have desired to thus relieve those who derive the benefit of construction contracts of the obligation to stand behind the contractors they retain, or why Congress might have desired to strip this protection from construction workers.

Nor has any court, so far as we are aware, identified any respect in which mechanics lien laws—which operate

only on third parties and do not directly regulate any ERISA-regulated entity—contravene any of the policies underlying ERISA.

Indeed, it is difficult to imagine how ERISA could be offended by a state law which merely says to entities that retain construction contractors that they will have to stand behind the contractors to the extent the contractors enter into executory contracts, receive the benefits of services under such contracts, and then fail to make the agreed-upon payments for those services.

Yet the majority of the lower courts, through formulaic analysis, have been quick to impute to Congress what can only be considered a quixotic intent.

Although the shareholder liability law directly at issue here does not have the same venerable history as mechanics lien laws and although shareholder liability laws have been enacted by fewer states, these two closely-related kinds of laws have generated a single body of lower court ERISA preemption law. And, like the case law regarding the mechanics lien laws, the decision below rests on formulaic analysis rather than on identifying any real conflict between the state law and the policies of ERISA.

The underlying theme of *Travelers, supra*, and *Dillingham, supra*, is that this type of decision-making will not do. And, given what is at stake here in real-world terms, we respectfully urge the Court to grant the instant *certiorari* petition and either set the case for plenary consideration or, at the very least, remand it for reconsideration by the Second Circuit in light of *Dillingham*.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 23 1997
CLERK

(3)

No. 96-1647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EDGAR ROMNEY, Manager-Secretary, Blouse, Skirt, Sportswear, Children's Wear & Allied Workers Union, Local 23-25, ILGWU,

Petitioner,

vs.

ALAN LIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT ALAN LIN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Alan Lin requests that this Court deny the petition of Edgar Romney, as Manager-Secretary of the Blouse, Skirt, Sportswear, Children's Wear & Allied Workers' Union Local 23-25, Union of Needletrades, Industrial and Textile Employees, for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit entered on August 27, 1996.

REASONS FOR DENYING THE WRIT

Petitioner has asserted three bases for his contention that this Court should review the Second Circuit's finding that Section 630 of New York's Business Corporation Law ("BCL"), which provides alternate enforcement mechanisms to collect delinquent contributions that the employer has not paid, is preempted by the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[1]

First, Petitioner contends that the Second Circuit's decision conflicts with the New York Court of Appeals' 1985 decision in *Sasso v. Vachris*, 66 N.Y.2d 28, 484 N.E.2d 1359 (1985), and departs from a purported trend following this Court's decision in *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), toward a more narrow definition of which state laws "relate to" employee benefit plans within the meaning of ERISA § 514, 29 U.S.C. § 1144. (Pet. at 10-16.) In so contending, Petitioner admonishes the Second Circuit for having relied on this Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), rather than on the legislative history of ERISA § 515, 29 U.S.C. § 1145. (Pet. at 12.)

Second, Petitioner contends that the Second Circuit's preemption analysis and its conclusion that BCL § 630 impermissibly

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[1] The Second Circuit's decision is reported at 94 F.3d 74, Pet. App. 1a-17a, and the decision denying the petition for rehearing is reported at 105 F.3d 806, Pet. App. 24a-39a.

references ERISA plans cannot be squared with this Court's recent decision in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 117 S.Ct. 832 (1997), decided after the Court of Appeals completed its consideration of the case before this Court. (Pet. at 16-18.)

Lastly, relying on this Court's decision in *Peacock v. Thomas*, 116 S.Ct. 862 (1996), Petitioner claims that this action was not properly removed since, contrary to the Second Circuit's holding, the state law action does not fall "within the scope" of ERISA § 502(a), 29 U.S.C. § 1132(a), a prerequisite to a finding that removable is proper. According to Petitioner, the legislative history behind the enactment of ERISA § 515, which he contends evidences a specific intention by Congress not to create exclusive federal remedies in actions for benefits, more properly governs whether Petitioner's action falls "within the scope" of ERISA § 502(a). (Pet. at 18-20.)

I.

NO CONFLICT IS PRESENTED AMONG THE RECENT PREEMPTION CASES OF THIS COURT AND THE SECOND CIRCUIT'S DECISION

Ignoring the fact that the Second Circuit's decision is entirely consistent with the recent preemption decisions of this Court, Petitioner contends that the writ should be granted because the decision at issue conflicts with a 1985 New York Court of Appeals decision and several state court decisions. To this end, Petitioner argues that the Second Circuit's determination that the analysis applied by New York State's Court of Appeals in *Sasso v. Vachris*, 66 N.Y.2d 28, 484 N.E.2d 1359 (1985), was foreclosed by this Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1980) is contrary to the legislative history of ERISA § 515. In so doing, Petitioner misinterprets the true basis for the *Vachris* court's now-misplaced finding that BCL § 630 was not preempted by ERISA. (Pet. at 11-12.)

In addressing the ERISA preemption issue, the New York State court considered the narrow issue of whether § 630 impermissibly "relates to" the ERISA-covered employee benefit plan within the

meaning of ERISA § 514(a). Concluding that it did not, the *Vachris* court relied on the now repudiated reasoning of the Second Circuit in *Rebaldo v. Cuomo*, 749 F.2d 133, 137 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985), which dictated that only state laws which "purport to regulate...the terms and conditions" of an ERISA plan are preempted. Based on that standard, the *Vachris* court reasoned that BCL § 630 did not purport to regulate the terms or conditions of the plan, but rather was merely an "enforcement mechanism" to collect money owed to the corporation. 66 N.Y.2d at 33.

However, in *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992) and *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708 (2d Cir. 1993, *rev'd on other grounds, sub nom., New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), the Second Circuit held that any further reliance on the "purport to regulate" standard adopted in *Rebaldo* (upon which the *Vachris* decision was based) was misplaced in view of the Supreme Court's rejection of that standard in *Ingersoll-Rand*. (Pet. App. 13a-14a.)[2]

Contrary to Petitioner's contention, the Second Circuit did not ignore the legislative history of § 515, but in fact acknowledged the *Vachris* court's review of that history and then concluded that this Court in *Ingersoll-Rand* "made clear that state statutes that augment ERISA remedies are preempted, as well as state statutes that impair ERISA remedies." (Pet. App. 14a.) Relying on *Ingersoll-Rand*, which did not distinguish between state law causes of action which

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[2] Indeed, even New York's Court of Appeals acknowledged in *Morgan Guaranty Trust Co. v. Tax Appeals Tribunal of Dept. of Taxation and Finance*, 80 N.Y.2d 44, 599 N.E.2d 656 (1992), that "[t]wo recent preemption cases, *Ingersoll-Rand* and *FMC Corp.[v. Holliday*, 498 U.S. 52 (1990)], have put to rest the contention that only laws relating to the terms, conditions or administration of a plan are preempted." The *Vachris* decision has also been sharply criticized by other circuits as being "suspect", *see, e.g., McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 20, n. 3 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992) and of "doubtful validity." *Local Union 598 Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d 1213, 1219 (9th Cir.), *aff'd*, 488 U.S. 881 (1988).

impact on the original 1974 ERISA provisions and those that impact upon the 1980 amendments, the Second Circuit held that the remedies provided by ERISA § 502(a) -- which "provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly" -- are exclusive. (Pet. App. 14a (quoting *Ingersoll-Rand*, 498 U.S. at 144).)

Petitioner's claim that several recent state cases are "inconsistent in principle with the Second Circuit decision" and demonstrate a "clear change in emphasis" is belied by an examination of these cases and the analyses applied.

Petitioner places great emphasis on the decision of the New Jersey Superior Court, Appellate Division, in *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities v. First Indemnity of America Ins. Co.*, 287 N.J. Super. 498, 671 A.2d 596 (App. Div. 1996). Eight days before the filing of this Petition, however, the Supreme Court of New Jersey had the opportunity to affirm that decision and further clarify the basis for its finding that ERISA preempted the state law action brought against sureties to recover on payment and performance bonds issued under the New Jersey Public Works Bond Act, upon the contractors' failure to make contribution payments to various benefit funds. 148 N.J. 561, 691 A.2d 339 (1997). The New Jersey court distinguished the state action before it from the type of preemption situation presented to the Court today, where a state action to collect unpaid benefit contributions specifically targets benefit plans by directly referring to fringe benefits, health and welfare or pensions plans, conflicts with an ERISA enforcement mechanism, touches upon rights or duties incident to the ERISA plan, and conflicts with a cause of action under ERISA. The New Jersey court unabashedly acknowledged that a state statute which achieves any of the foregoing fundamentally differs from the ERISA-neutral and union-neutral Bond Act found by the Court not to be preempted by ERISA. 148 N.J. at 575-76.

The New Jersey court, in determining its finding to be in accord with this Court's decisions in *Travelers* and *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 117 S.Ct. 832 (1997), the Second Circuit's decision in *Greenblatt*

v. Delta Plumbing & Heating Corp., 68 F.3d 561 (2d Cir. 1995), and the Third Circuit's decision in *Ragan v. Tri-County Excavating*, 62 F.3d 501 (3d Cir. 1995), deemed it significant that the New Jersey Bond Act was a law of general applicability that functioned without any reference to ERISA, "ha[ving] existed in various forms for almost eighty years, long before Congress adopted ERISA." 148 N.J. at 576. Of additional import to the court was that the actions brought pursuant to the Bond Act do not "undermine the set of remedies ERISA provides to beneficiaries under its 'comprehensive civil enforcement scheme.'" *Id.* at 574-75 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).) BCL § 630, by contrast, requires the existence of an ERISA plan as an element of an action brought thereunder and imposes an obligation to make payments that ERISA imposes on someone else. (Pet. App. 35a-36a.) By doing so, the statute impermissibly expands and directly impacts upon remedies provided by ERISA, thus completely undermining the Congressional policy behind § 502(a) by allowing ERISA-plan beneficiaries "to obtain remedies under state law that Congress rejected in ERISA". (Pet. App. 9a-11a (quoting *Pilot Life*, 481 U.S. at 54).)[3]

Similarly, the Court of Appeals of Indiana in *Seaboard Surety Co. v. Indiana State District Council of Laborers and Hod Carriers Health and Welfare Fund*, 645 N.E.2d 1121 (Ind. Ct. App. 1995), held that a state common law action against a surety to collect delinquent fringe benefit contributions from its payment bond was not preempted by ERISA and, in so doing, addressed the same considerations factored into the Second Circuit's decision. The Indiana court, in rendering its decision without the aid of the *Travelers* analysis, found that the state law did not refer to benefit plans nor single them out for special treatment, and did not present an actual conflict with ERISA. *Id.* at 1127. It further determined, contrary to the finding of the Second Circuit, that the law did not "relate to" an ERISA plan since the bond requirement and remedy, which has

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[3] In reaching its conclusion, the court in *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities* did not deem the legislative history behind ERISA § 515 to be relevant to the preemption inquiry before the court.

existed since the nineteenth century, was a traditional exercise of state authority and that any affect on the plan itself was merely incidental. *Id.* Clearly, the determination in *Seaboard* does not in any way change the analysis applied or the result reached by the Second Circuit.

Placing principal reliance upon the Hawaii Supreme Court's decision in *Hawaii Laborers Trust Funds v. Maui Prince Hotel*, 81 Haw. 487, 918 P.2d 1143 (1996), which considered whether an action brought under the state Mechanic's and Materialman's Lien Law was preempted by ERISA, Petitioner erroneously argues once again that the legislative history of § 515 is of primary importance in considering the preemption issue. The Hawaii court, in determining that Hawaii's "neutral/general statute which was not enacted in relation to ERISA employee benefit plans" was not preempted by ERISA, distinguished those state statutes that single out ERISA employee welfare benefit plans from those statutes of general applicability that merely provide a remedy to collect on a judgment on behalf of a plan. *Id.* at 1152-53. The Second Circuit made that very same distinction in the case at bar when it held that a BCL § 630 action was not an action to collect a judgment but rather was a suit to collect directly from shareholders the delinquent contributions that the corporate employer had failed to pay. (Pet. App. 31a.) This distinction logically resulted in the Second Circuit's conclusion that ERISA conflicted with the civil enforcement provisions of ERISA § 502(a) because "ERISA § 502(a) already provides a means for collecting delinquent ERISA contributions from employers .... [and] does not impose upon the shareholders of the employer corporation the *employer's* statutory liability to make contributions." (Pet. App. 11a-12a, 32a-33a.)

Thus, an examination of the cases principally relied upon by Petitioner in support of his claim that the Second Circuit's decision is in conflict with the decisions of other courts confirms that Petitioner's quixotic distinction simply does not exist.[4]

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[4] The Third Circuit's decision in *Ragan*, claimed by Petitioner to be a part of the "clear shift in emphasis", similarly concluded that the Union's action under a surety bond was not preempted by ERISA since it was not

(Footnote continued)

II.

WITH THE BENEFIT OF DILLINGHAM THE SECOND CIRCUIT'S DECISION WOULD REMAIN UNDISTURBED

In analyzing whether California's prevailing wage statute was preempted by ERISA, this Court sought to determine whether for purposes of ERISA § 514(a), the statute had a connection with or a reference to a covered employee benefit plan. *Dillingham,* 117 S.Ct. at 837. Contrary to the Second Circuit's decision at issue here, where it was determined that New York's BCL § 630 makes explicit reference to ERISA plans, significantly affects ERISA plans in a manner not so "tenuous, remote or peripheral", disserves the basic purpose of preemption in ERISA § 514, and falls within the scope of ERISA § 502(a) by providing to plans a remedy to enforce employer contributions which Congress could have provided for but elected not to, the statute at issue in *Dillingham* made no reference to ERISA plans, explicitly or otherwise, and had no connection with ERISA. 117 S.Ct. at 839-40.

In setting forth the liability for which it authorizes recovery, BCL § 630 *on its face* specifically refers to contributions payable under two types of plans maintained by an employer which are regulated by ERISA: employee welfare plans and employee pension plans. This Court has made clear that such reference, in and of itself, automatically requires a finding of preemption.[5] Indeed, BCL § 630 expressly provides that the ten largest shareholders of a corporation shall be personally liable for the corporation's delinquent contributions to ERISA plans. The very existence of liability owed

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specifically designed to affect employee benefit plans, did not single out such plans for special treatment, nor was the cause of action predicated upon the existence of an ERISA plan. 62 F.3d at 511.

[5] *See District of Columbia v. Greater Washington Bd. of Trade,* 506 U.S. 125, 131 (1992) (specific reference in statute requiring that mandated coverage be measured by reference to employee's "existing health insurance coverage" which were welfare benefit plans regulated by ERISA); *Mackey v. Lanier Collection Agency & Service, Inc.,* 486 U.S. 825, 829 (1988) (state statute which exempted funds or benefits of an employee benefit plan or program preempted).

by an employer for delinquent contributions depends upon the existence and application of an ERISA plan.[6]

In contending that *Dillingham* is controlling and that the Second Circuit's analysis ran afoul of this Court's decision, Petitioner ignores the Second Circuit's holding that BCL § 630 *explicitly* (and, therefore, impermissibly) referenced ERISA plans in a significant way by providing for a remedy not provided for by Congress in its comprehensive set of remedies set forth in § 502 (a), thus altering the incentives for employers to create and maintain ERISA plans. As the Second Circuit stated: "Thus, while § 630 would be salutary for plans that suffer a loss by reason of an employer's failure to contribute, this benefit would be achieved at a cost because, for stockholders of companies subject to § 630, personal liability may be a factor that militates against creating ERISA plans in the first place." (Pet. App. 9a.)

Petitioner's assertion that application of the *Dillingham* analysis would alter the Second Circuit's decision further fails to consider that the California statute at issue, which regulated apprenticeship standards and the wages paid on state public works, was enacted before ERISA and dealt with matters traditionally subject to local regulation. 117 S.Ct. at 840-41. By contrast, BCL § 630 is not a generally applicable statute that makes no reference to, and functions irrespective of, the existence of an ERISA plan. (Pet. App. 35a.) Thus, the Second Circuit was not required, as Petitioner contends, to apply a "presumption against preemption" analysis, *Dillingham*, 117 S.Ct. at 841, since there was no "paucity of indication in ERISA", *id.*, that Congress could have preempted the remedy made available by § 630 but chose not to do so.[7]

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[6] As in *Greater Washington*, the amount of recovery cannot be determined but for specific reference to the ERISA plans themselves.

[7] Moreover, where as here, causes of action have been brought pursuant to state laws authorizing the imposition of liability for the violation of rights guaranteed by ERISA, the Supreme Court has repeatedly found them to be preempted by ERISA's enforcement procedure. *See Ingersoll-Rand*, 498 U.S. 133 (state common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under a plan covered by

(Footnote continued)

III.

THE SECOND CIRCUIT PROPERLY CONCLUDED THAT THE STATE LAW ACTION AT ISSUE FELL "WITHIN THE SCOPE" OF § 502(a) AND THAT REMOVAL WAS PROPER

The final basis upon which Petitioner seeks a writ of certiorari is predicated upon the Second Circuit's finding that the state law action falls "within the scope" of ERISA § 502(a) for purposes of complete preemption. Petitioner contends that the Second Circuit's determination was erroneous and that removal of the action to Federal Court was therefore improper. (Pet. at 18-20.)

Contrary to Petitioner's claim, however, the Second Circuit did not find the state law to be "within the scope" of § 502(a) merely based upon its observation that any "suit to collect ERISA contributions is very much of central concern to the federal statute." (Pet. at 19, Pet. App. 38a.) Rather, the Second Circuit, in denying Petitioner's request for rehearing, determined that the cause of action provided by BCL § 630 and being pursued by Petitioner fell squarely within this Court's conflict preemption doctrine, "under which the preemptive effect of § 502(a) is held to be 'so complete that an ERISA preemption defense provides a sufficient basis for removal of a cause of action to the federal forum.'" (Pet. App. 34a (quoting *Ingersoll-Rand*, 498 U.S. at 145).) Indeed, the Second Circuit found New York's BCL § 630 to be "just like the Texas cause of action at issue in *Ingersoll-Rand*, because the state statute '[u]nquestionably ... purports to provide a remedy for the violation of a right expressly guaranteed by [ERISA] and exclusively enforced by § 502(a)." *Id.*

Further, there is no merit to Petitioner's claim that this Court's decision in *Peacock v. Thomas*, 116 S.Ct. 862 (1996), presents an analogue to the situation before this Court. The basis for liability in *Peacock* was the state's veil-piercing doctrine, the state law being one of general applicability; the obligation imposed by § 630, by

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ERISA preempted); *Pilot Life*, 481 U.S. 41, 47-48 (state common law contract and tort claims asserting improper processing of a claim for benefits under ERISA plan preempted).

contrast, "is the very obligation to make payments that ERISA requires, and the state law itself designates new ERISA obligors. Thus, the basis for Romney's liability is an obligation that ERISA imposes on someone else. Such a situation plainly constitutes complete 'conflict preemption' conferring federal jurisdiction under ERISA." (Pet. App. 35a-36a.)

In addressing the meaning of the "within the scope" requirement formalized by this Court in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), the Second Circuit acknowledged that Petitioner's action alleged an ERISA violation by the corporate employer, but was not brought against a party upon whom ERISA predicates liability. (Pet. App. 37a.) Yet, the Second Circuit noted that the violations of ERISA by the corporate employer were "ones for which the corporations' shareholders are expressly accountable by the state statute." (Pet. App. 34a.) Thus, of primary importance to the Second Circuit in determining that the cause of action alleged by Petitioner fell "within the scope" of ERISA, was the fact that "ERISA explicitly provided a cause of action for Romney, at least vis a vis the employer", and by imposing liability on shareholders that would not otherwise exist, plaintiffs would be afforded an additional enforcement mechanism to recover payments that the corporation was already obligated to provide. (Pet. App. 16a, 38a-39a.) According to the Second Circuit, the fact that an action is directed against a defendant not liable under ERISA does not prohibit a finding that such action is "within the scope" of § 502(a) where the action is to collect ERISA contributions -- which is of "central concern to the federal statute" -- and the party sued is in an ownership relationship to the party traditionally liable under ERISA. (Pet. App. 38a-39a.)

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 10 1997
CLERK

No. 96-1647

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EDGAR ROMNEY, Manager-Secretary, Blouse, Skirt, Sportswear, Children's Wear & Allied Workers Union, Local 23-25, ILGWU,

Petitioner,

v.

ALAN LIN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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STATUTES

New York Business Corporations Law § 630 ..... *passim*

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PETITIONER'S REPLY BRIEF

Respondent's Brief in Opposition ("Br. Opp.") seeks primarily to obscure the conflict between the Second Circuit's decision in this case and other cases, particularly those decided since *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), both by misstating the conflicting cases and by maintaining, repeatedly but incorrectly, that New York Business Corporation Law ("BCL") § 630 is not a collection statute of general application but one that imposes a primary obligation to fund ERISA plans and applies to ERISA plans exclusively.

(a) Respondent points to a recent New Jersey case, *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities v. L.B.S. Constr. Co.*, 287 N.J. 561, 691 A.2d 339 (1997), as if that case were consistent with the Second Circuit decision here. *See* Br. Opp. at 4 (*L.B.S. Constr. Co.* "[found] that ERISA preempted the state law action brought against sureties to recover on payment and performance bonds issued under the New Jersey Public Works Bond Act, upon the contractors' failure to make contribution payments to various benefit funds."). In fact, *L.B.S. Constr. Co.* held the state statutory bonding requirement *not* preempted by ERISA (287 N.J. at 561), and did so on bases that cannot be squared with the Second Circuit's analysis in this case. In particular, *L.B.S. Constr. Co.* specifically approved the understanding of the Appellate Division opinion in the same case, quoted in our Petition (at 14), that the more recent ERISA preemption cases concerning collection of delinquent contributions from ERISA plans have generally held the state causes of action non-preempted. 287 N.J. at 568. *See also Petition for Writ of Certiorari* (*Pet.*) at 14; *Ironworkers Dist. Council of the Pacific Northwest v. Woodland Park Zoo Planning & Development,* No. 38165-2-I, 1997 Wash. App. LEXIS 1461, at *15 n.2 (Wash. Ct. App. Sept. 2, 1997) (holding a state statute requiring general contractors to provide a bond to protect workers' pay, including fringe benefit contributions, on public works projects, preempted because required to do so by an earlier Washington case, *Puget Sound Electrical Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wash. 2d 565 (1994), but noting that "other jurisdictions, applying the *Travelers* analysis, have since determined that similar statutes are not preempted by ERISA," citing, *inter alia, Hawai'i Laborers' Trust Funds v. Maui Prince Hotel,* 81 Haw. 487, 918 P.2d 1143 (1996) and *L.B.S. Constr. Co.*)

L.B.S. Constr. Co., then, far from supporting the result reached by the Second Circuit in this case, is a state su-

preme court opinion inconsistent with that result and with the Second Circuit's reasoning, and sharpens the need for plenary review.

(b) More generally, respondent repeatedly attempts to distinguish the cases we cited in the Petition as conflicting with the Second Circuit's decision in this case on the basis that, unlike those cases, this one involves a statute, BCL § 630, that is not a statute of general application but one that "requires the existence of an ERISA plan as an element of an action brought thereunder." Br. Opp. 5; *see also id.* at 4 (distinguishing *L.B.S. Constr.* because the statute in that case "was a law of general applicability that functioned without any reference to ERISA" and existed for many years before Congress adopted ERISA); *id.* at 5 (distinguishing *Seaboard Surety Co. v. Indiana State District Council of Laborers Health and Welfare Fund,* 645 N.E. 2d 1121, 1127 (Ind. App. 1995) because "the state law did not refer to benefit plans nor single them out for special treatment"); *id.* at 6 (*Hawai'i Laborers Trust Funds* involved not a "statute[] that single[s] out ERISA employee welfare benefit plans" but a "statute[] of general applicability that merely provide[s] a remedy to collect on a judgment on behalf of a plan.")

In fact, BCL § 630, the most recent incarnation of century-old New York provisions for the collection of unpaid employee compensation from shareholders (*see, e.g., Coffin v. Reynolds,* 37 N.Y. 640 (1868)), on its face applies to *"all* debts, wages or salaries due and owing to any . . . laborers, servants or employees," and defines "wages or salaries" as *"all* compensation and benefits payable by an employer to or for the account of the employee. B.C.L § 630 (emphasis added). There is no reference in the statute to ERISA plans as such. And, while the statute does amplify the general definition by specifying that it includes but is not limited to "salaries, overtime, vacation, holiday and severance pay; *employer contributions to or payments of insurance or welfare benefits; employer con-*

tributions to pension or annuity funds; and any other moneys properly due or payable for services rendered by such employee," (emphasis added), the listing of employer contributions to welfare and pension funds, along with other forms of employee compensation, far from singling out such contributions for special treatment simply confirms that benefit plan contributions are *not* to be treated differently from the other forms of compensation also listed.

Thus, an unpaid judgment for ordinary cash wages can be collected from a shareholder under BCL § 630, as can unpaid vacation or holiday or severance pay that is not provided through an ERISA plan. *See Massachusetts v. Morash,* 490 U.S. 107 (1988); *Fort Halifax Paper Co. v. Coyne,* 482 U.S. 1 (1987). In short, it is simply not true that BCL § 630 "requires the existence of an ERISA plan as an element of an action brought thereunder." Br. Opp. at 5. And a mere mention of benefit plans in order to clarify that they are *not* singled out for special treatment does not alone give rise to ERISA preemption. *California Div. of Labor Standards Enforcement v. Dillingham Construction N.A., Inc.,* 117 S. Ct. 832, 838 (1997) (a "reference" to an ERISA plan results in preemption only "[w]here a State's law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation."); *see United Wire, Metal and Machine Health & Welfare Fund v. Morristown Memorial Hosp.,* 995 F.2d 1179, 1192 n.6 (3rd Cir.), *cert. denied,* 510 U.S. 944 (1993) ("[F]or example, a state statute providing that 'no employer, including an ERISA plan, shall discriminate on grounds of race or gender' would not be preempted, despite its reference to an ERISA plan."); *Thikol Corp. v. Roberts,* 76 F.3d 751, 758 (6th Cir. 1996), *cert. denied,* 117 S.Ct. 2448 (1997).[1]

[1] Indeed, to paraphrase the New Jersey Supreme Court in *L.B.S. Const.*, finding BCL § 630 preempted as applied to contributions to ERISA plans

(c) In a further attempt to distinguish the conflicting cases, respondent maintains that BCL § 630 is not simply remedial, but imposes a primary obligation upon shareholders to make benefit contributions. Br. Opp. at 6 (unlike the mechanics' lien statute in *Hawai'i Laborers Trust Funds*, BCL § 630 does not "merely provide a remedy to collect on a judgment on behalf of a plan.") Again, this suggestion is simply wrong: BCL § 630 on its face provides a cause of action against shareholders, but *only* "within 90 days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for services rendered." Pet. at 4. Similarly, the mechanics lien cause of action held valid under ERISA in *Hawai'i Laborers Trust Funds* proceeded against a party that had *no* direct obligation under ERISA to make contributions, and arose, as a matter of law, once the party that did have a direct obligation failed to satisfy that duty. 81 Haw. at 491.

There is, consequently, no cognizable distinction for ERISA preemption purposes between the mechanics' lien cause of action upheld in *Hawai'i Laborers Trust Funds* and the BCL § 630 cause of action here at issue. Both statutes are means of collecting benefit plan contributions from a third party when the entity obligated to make the payments has failed to do so. The Hawaii and New York statutes differ only in the identity of the third party required to pay in that circumstance.

(d) Respondent *does* recognize that the New York Court of Appeals opinion in *Sasso v. Vachris*, 66 N.Y.2d

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would lead to paradoxical results. For example, employees paid solely in cash that covered their benefit needs would be able to recover against the [shareholders], but those paid in a combination of cash and fringe benefits would not be able to recover the latter. *Cf. Keystone [Chapter, Associated Builders & Contractor, Inc. v. Foley*, 37 F.3d 945 (3rd Cir. 1994)], at 959-60 (noting that allowing preemption under similar circumstances would create "disincentive" against awarding benefits). [148 N.J. at 575.]

28, 484 N.E.2d 1359 (1985) directly conflicts with the decision of the Second Circuit in this case, and can point to no later case in the New York courts to the contrary concerning the validity of BCL § 630 (because there is no such case). Br. Opp. at 2. Respondent maintains, instead, that the Second Circuit correctly concluded that *Sasso* was wrongly decided. *Id.*, at 2-4.

For reasons explained in the petition, we strongly disagree with that assessment.[2] Pet. at 10-12. For present purposes, however, the existence of the conflict, rather than its proper resolution, is the more salient point. It is precisely to resolve the question whether it is the New York Court of Appeals or the Second Circuit that has correctly analyzed the application of ERISA's preemption provisions to BCL § 630 that a grant of certiorari is necessary. As long as the conflicting decisions both continue in effect, the state but not the federal courts in New York will require shareholders of closely held corporations to pay unsatisfied judgments for unpaid employer contributions to benefit plans.

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[2] In particular, as respondent notes, the Second Circuit rejected *Sasso*'s reliance on the legislative history of the 1980 amendments on the basis that *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) estabilshed a generally applicable rule preempting any state statute that augments any ERISA remedy. Br. Opp. at 3. While it is true that "*Ingersoll-Rand* . . . did not distinguish between state law causes of action which impact on the original 1974 ERISA provisons and those that impact upon the 1980 amendments . . ." (Br. Opp. at 3), it is also true that *Ingersoll Rand* did not involve any ERISA provision amended in 1980, and therefore had no reason to consider the impact of the 1980 amendments. And, since a finding of conflict preemption depends ultimately upon Congressional intent, the legislative history of ERISA § 515, indicating a Congressional intent to preserve state law actions to collect delinquent contributions *is* pertinent, as *Sasso* indicated, in determining whether such actions are preempted. *See also Hawai'i Laborers' Trust Funds*, 81 Haw. at 499-500 (stressing the legislative history deemed irrelevant by the Second Circuit.)

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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